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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

PHILIP MORRIS USA INC., BROWN & WILLIAMSON HOLDINGS, INC., LORILLARD TOBACCO COMPANY and R.J. REYNOLDS TOBACCO COMPANY,

Petitioners,

v.

RONALD ACCORD, *et al.*

Respondents.

On Petition for a Writ of Certiorari to The Supreme Court Of Appeals Of West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause bars the use of "reverse bifurcation" in a consolidated mass-tort trial, whereby a defendant's liability for punitive damages to hundreds of plaintiffs is adjudicated, based entirely on aggregate proof, prior to any finding of compensatory liability to even a single plaintiff.

RULE 14.1(b) STATEMENT

Petitioners are Philip Morris USA Inc., Brown & Williamson Holdings, Inc., Lorillard Tobacco Company and R.J. Reynolds Tobacco Company. Respondents are Ronald Accord and all other plaintiffs in the case styled *In re: Tobacco Litigation*, Civil Action No. 00-C-5000, Ohio County, West Virginia, as well as the Honorable Arthur M. Recht in his capacity as judge/special appointee of the West Virginia Mass Litigation Panel. There are approximately 735 plaintiffs in Civil Action No. 00-C-5000, and no caption in this proceeding identifies those individuals. Petitioners have included as an appendix to this petition an unofficial list of the plaintiffs subject to the challenged trial order who have named one or more of the petitioners as a defendant. See App. 77a-109a.

Twenty other defendants are subject to the challenged trial order, but were not parties to the writ of prohibition proceeding in the Supreme Court of Appeals of West Virginia. Petitioners also have included as an appendix to this petition an unofficial list of these defendants. See App. 110a-111a.

RULE 29.6 STATEMENT

Petitioner Philip Morris USA Inc. is a wholly owned subsidiary of Altria Group, Inc. Altria Group, Inc. is the only publicly held company that owns 10% or more of Philip Morris USA Inc.'s stock. Altria Group, Inc. is a publicly held company. No publicly held company owns 10% or more of Altria Group, Inc.'s stock.

Petitioner Brown & Williamson Holdings, Inc. is an indirect, wholly owned subsidiary of British American Tobacco, p.l.c., a publicly traded corporation. Before August 2, 2004, Petitioner was known as Brown & Williamson Tobacco Corporation. On July

30, 2004, a transaction was completed whereby Petitioner R.J. Reynolds Tobacco Company became the successor in interest to Brown & Williamson Tobacco Corporation's U.S. tobacco business.

Petitioner Lorillard Tobacco Company is wholly owned by Lorillard, Inc., which is wholly owned by Loews Corporation. Shares of Loews Corporation are publicly traded. Other subsidiaries of Loews Corporation that are not wholly owned by Loews Corporation but have some securities in the hands of the public are CNA Financial Corporation and Diamond Offshore Drilling, Inc. In addition, Loews Corporation indirectly owns 100% of the general partner of Boardwalk Pipeline Partners, LP, whose subsidiaries, Boardwalk Pipelines, LP and Texas Gas Transmission, L.L.C., have issued bonds that are publicly owned. Loews Corporation has also issued Carolina Group stock, a publicly traded tracking stock.

Petitioner R.J. Reynolds Tobacco Company, a North Carolina corporation, is the successor by merger to R.J. Reynolds Tobacco Company, a New Jersey corporation. The existing R.J. Reynolds Tobacco Company is an indirect, wholly owned subsidiary of Reynolds American Inc., a publicly traded corporation. Petitioner Brown & Williamson Holdings, Inc. owns approximately 42% of the common stock of Reynolds American Inc. As noted above, Brown & Williamson Holdings, Inc. is an indirect, wholly owned subsidiary of British American Tobacco, p.l.c., a publicly traded corporation.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
RULE 14.1(b) STATEMENT ii
RULE 29.6 STATEMENT ii
TABLE OF AUTHORITIES vii
JUDGMENTS BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISION INVOLVED 1
STATEMENT 2
REASONS FOR GRANTING THE PETITION 11
I. WEST VIRGINIA'S APPROACH TO ASSESSING PUNITIVE DAMAGES VIOLATES DUE PROCESS 12
A. West Virginia's Approach Cannot Be Reconciled With *State Farm* And *Williams*. 12
1. The Phase I Jury's Findings Will Not Bear A Sufficient Nexus To The Conduct That Harmed Any Particular Plaintiff. 13
2. The Application Of A Uniform Multiplier To Disparately-Situated Plaintiffs Violates Due Process 18
B. The Decision Below Conflicts With Rulings Of The Second Circuit And Other Courts. 20

TABLE OF CONTENTS—continued

Page(s)

II. THIS COURT SHOULD GRANT REVIEW IN ORDER TO HALT WEST VIRGINIA'S REPEATED AND UNCONSTITUTIONAL USE OF REVERSE BIFURCATION TO RESOLVE AGGREGATED PUNITIVE-DAMAGES CLAIMS IN MASS-TORT LITIGATION.....24

A. The West Virginia Supreme Court Of Appeals Has Made Clear That It Will Continue To Place Expediency Over Concerns Of Due Process In Mass-Tort Litigation. 24

B. Immediate Review Is Warranted.....30

CONCLUSION 33

APPENDIX

APPENDIX A: Order of the Supreme Court of Appeals of West Virginia (November 7, 2007) 1a

APPENDIX B: Order of the Circuit Court of Ohio County, West Virginia (August 28, 2007).....3a

APPENDIX C: Transcript of Hearing August 17, 2007 In the Circuit Court of Ohio County, West Virginia.....5a

APPENDIX D: Order of the Circuit Court for Ohio County, West Virginia (August 28, 2007).....15a

APPENDIX E: Transcript of Hearing May 23, 2007 In the Circuit Court of Ohio County, West Virginia 17a

TABLE OF CONTENTS—continued

Page(s)

APPENDIX F: Opinion and Order of the Circuit Court of Ohio County, West Virginia (December 26, 2006) 28a

APPENDIX G: Opinion of the Supreme Court of Appeals of West Virginia (December 2, 2005) 31a

APPENDIX H: Opinion and Order of the Circuit Court of Ohio County, West Virginia (June 16, 2004) 66a

APPENDIX I: Case Management Order/Trial Plan of the Circuit Court of Ohio County, West Virginia (January 11, 2000) 70a

APPENDIX J: List of Plaintiffs With Claims Pending in Civil Action No. 00-C-5000 (December 13, 2007) 77a

APPENDIX K: List of Defendants Not Party To the Writ of Prohibition Proceeding In the Supreme Court of Appeals of West Virginia 110a

TABLE OF AUTHORITIES

Page(s)

CASES

Allison v. *Citgo Petroleum Corp.*,
151 F.3d 402 (5th Cir. 1998) 20-21

BMW of N. Am. Inc. v. *Gore*,
517 U.S. 559 (U.S. 1996) 16, 19

In re Baycol Prods. Litig.,
218 F.R.D. 197 (D. Minn. 2003) 22-23

Bd. of Educ. v. *Super. Ct.*,
448 U.S. 1343 (1980) 1, 30

Boyd v. *Goffoli*,
608 S.E.2d 169 (W. Va. 2004) 26

In re Brooklyn Navy Yard Asbestos Litig.,
971 F.2d 831 (2d Cir. 1992) 27

Cain v. *Armstrong World Indus.*,
785 F. Supp. 1448 (S.D. Ala. 1992) 27-28

In re Chevron USA, Inc.,
109 F.3d 1016 (5th Cir.1997) 32

Clinton v. *Brown & Williamson Holdings, Inc.*,
Nos. 05 Cv. 9908, 05 Cv. 9174 2007 WL
2161778 (S.D.N.Y. July 25, 2007) 28

Colindres v. *QuietFlex Mfg.*,
235 F.R.D. 347 (S.D. Tex. 2006) 21

Cont'l Trend Resources, Inc. v. *OXY USA Inc.*,
101 F.3d 634 (10th Cir. 1996) 31

Crawford v. *Taylor*,
75 S.E.2d 370 (W. Va. 1953) 5

TABLE OF AUTHORITIES—continued

Page(s)

Engle v. *Liggett Group, Inc.*,
945 So. 2d 1246 (Fla. 2006) (per curiam),
cert. denied, 128 S. Ct. 96 (2007) 22, 29

In re Ethyl Corp.,
975 S.W.2d 606 (Tex. 1998) 27

Gen. Motors Acceptance Corp. v. *D.C. Wrecker Serv.*, 647 S.E.2d 861 (W. Va. 2007) 13

Hicks v. *Oklahoma*,
447 U.S. 343 (1980) 31-32

Insolia v. *Philip Morris Inc.*,
216 F.3d 596 (7th Cir. 2000) 11

Jackson v. *State Farm Mut. Auto. Ins. Co.*,
600 S.E.2d 346 (W. Va. 2004) 26

Johnson v. *Celotex Corp.*,
899 F.2d 1281 (2d Cir. 1990) 27

Kocher v. *Oxford Life Ins. Co.*,
602 S.E.2d 499 (W. Va. 2004) (per curiam) 26

Lilly v. *Virginia*,
527 U.S. 116 (1999) 30

Madruga v. *Super. Ct.*,
346 U.S. 556 (1954) 1, 30

Merrick v. *Paul Revere Life Ins. Co.*,
500 F.3d 1007 (9th Cir. 2007) 31-32

Nelson v. *Wal-Mart Stores, Inc.*,
245 F.R.D. 358 (E.D. Ark. 2007) 23

TABLE OF AUTHORITIES—continued

Page(s)

O'Neal v. *Wackenhut Servs., Inc.*,
No. 3:03-CV-397, 2006 WL 1469348 (E.D. Tenn. May 25, 2006) 23

Philip Morris Inc. v. *Angeletti*,
752 A.2d 200 (Md. 2000) 20, 21

Philip Morris USA v. *Williams*,
127 S. Ct. 1057 (2007) ..... *passim*

Ramirez v. *New York City Off-Track Betting Corp.*,
112 F.3d 38 (2d Cir. 1997) 32

In re Repetitive Stress Injury Litig.,
11 F.3d 368 (2d Cir. 1993) 27

In re Simon II Litig.,
407 F.3d 125 (2d Cir. 2005) 20

State ex rel. Allman v. *MacQueen*,
551 S.E.2d 369 (W. Va. 2001) (per curiam) 28

State ex rel. Appalachian Power Co. v. *MacQueen*, 479 S.E.2d 300 (W. Va. 1996) 25

State ex rel. Appalachian Power Co. v. *Ranson*,
438 S.E.2d 609 (W. Va. 1993) 5

State ex rel. Chemtall Inc. v. *Madden*,
No. 33380, 2007 WL 4098937 (W. Va. Nov. 15, 2007) 24

State ex rel. Mobil Corp. v. *Gaughan*,
563 S.E.2d 419 (W. Va.) (per curiam), *cert. denied*, 537 U.S. 944 (2002) 27

TABLE OF AUTHORITIES—continued

Page(s)

State ex rel. Taylor v. *Nibert*,
640 S.E.2d 192 (W. Va. 2006) 5-6

State Farm Mut. Auto. Ins. Co. v. *Campbell*,
538 U.S. 408 (2003) ..... *passim*

In re Tobacco Litig.,
624 S.E.2d 738 (W. Va. 2005) ..... *passim*

United States v. *Centennial Sav. Bank FSB*,
499 U.S. 573 (1991) 31

White v. *Ford Motor Co.*,
500 F.3d 963 (9th Cir. 2007) 17, 32

CONSTITUTION AND STATUTES

U.S. CONST. amend. VII 23

U.S. CONST. amend. XIV 1

28 U.S.C. § 1257(a) 1

W. Va. Code § 53-1-1 5

RULES

S. CT. R. 10(c) 30

FED. R. CIV. P. 42(a) 28

W. VA. R. CIV. P. 23(b) 28

W. VA. R. CIV. P. 42(a) 5, 28

W. VA. TR. CT. R. 26.01 ..... 6, 28

MISCELLANEOUS

TABLE OF AUTHORITIES—continued

Page(s)

Michael P. Addair, *A Small Step Forward: An Analysis of West Virginia's Attempt At Joint And Several Liability Reform*, 109 W. VA. L. REV. 831 (2007) 25

Brian Dorsey, *The Good, the Bad, and the Ambiguous: Recent Developments in West Virginia's Class Action Jurisprudence*, 107 W. VA. L. REV. 261 (2004) 25

Editorial, *The Asbestos-Fraud Express*, WALL ST. J., June 2, 2006, at A18 25

'Judicial Hellhole' Label Not Unfair, THE INTELLIGENCER WHEELING NEWS-REGISTER, Nov. 9, 2003, at C4 25

Petition for Writ of Certiorari, *Daniel Measurement Servs.* v. *Eagle Research Corp.*, No. 07-384, 2007 WL 2736284 (U.S. Sept. 19, 2007) 25

Petition for Writ of Certiorari, *Mobil Corp.* v. *Adkins*, No. 02-132, 2002 WL 32134868 (U.S. July 24, 2002) 33

Petition for Writ of Certiorari, *Union Carbide Corp.* v. *Recht*, No. 03-319, 2003 WL 22428919 (U.S. Aug. 22, 2003) 24

PETITION FOR A WRIT OF CERTIORARI

Petitioners Philip Morris USA Inc., Brown & Williamson Holdings, Inc., Lorillard Tobacco Company, and R.J. Reynolds Tobacco Company respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Appeals of West Virginia in this case.

JUDGMENTS BELOW

The order of the Supreme Court of Appeals of West Virginia, App. 1a-2a, is unreported. The underlying order of the Circuit Court for Ohio County, App. 3a-4a, is unreported. An earlier decision of the Supreme Court of Appeals of West Virginia addressing issues that are the subject of this petition, App. 31a-65a, is reported at 624 S.E.2d 738.

JURISDICTION

The order of the Supreme Court of Appeals of West Virginia denying petitioners' petition for a writ of prohibition was entered on November 7, 2007. App. 1a-2a. This Court has jurisdiction to review this decision under 28 U.S.C. § 1257(a). See *Bd. of Educ.* v. *Super. Ct.*, 448 U.S. 1343, 1345-46 (1980); *Madruga* v. *Super. Ct.*, 346 U.S. 556, 557 n.1 (1954) ("The State Supreme Court's judgment finally disposing of the writ of prohibition is a final judgment reviewable here under 28 U.S.C. § 1257.").

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides: "nor shall any state deprive any person of life, liberty, or property, without due process of law * * *."

STATEMENT

The courts of West Virginia have adopted, and employ with increasing frequency, an unconstitutional approach to the adjudication of punitive-damages claims in mass-tort litigation. In the decisions below, the West Virginia courts have approved a trial plan that consolidates more than 700 separate personal-injury actions brought by individual smokers. The plaintiffs' product liability and fraudulent concealment claims—similar to one another only in that each plaintiff asserts an injury related to his or her use of some tobacco product—will be tried in a three-stage proceeding.

Phase I of this trial is scheduled to commence on March 18, 2008. In that proceeding, the jury will determine, based entirely on aggregate proof that is untethered to the injuries or experiences of any individual plaintiff, certain elements of the compensatory liability inquiry. This jury will also determine—again without the benefit of evidence about any individual plaintiff—whether each defendant's conduct merits punitive damages. If it answers this question in the affirmative as to any defendant, the same jury in Phase I(A) will determine a punitive damages "multiplier" for that defendant. That determination, too, will be based entirely on aggregate proof; the evidence will bear no demonstrated nexus to the injuries to any individual plaintiff, much less to those of all plaintiffs.

In Phase II proceedings, different fact-finders will determine whether each plaintiff has established the remaining elements of his or her liability claims and is entitled to compensatory damages. The Phase I(A) multiplier will then be used to fix the particular

dollar amount of punitive damages owed by each defendant to each individual plaintiff.

The Phase I jury will thus be asked to determine whether each defendant's conduct warrants punishment, and to set a single punitive-damages multiplier for each defendant that will be applied in every follow-on case, based on a broad composite of the actions of four different defendants over the course of a half century. It will do so without being told anything at all about the persons who allegedly were harmed by any aspect of that composite, what injuries those persons suffered, or whether the defendants are responsible for those injuries. Nor will the jury know the total amount of compensatory damages the plaintiffs will eventually recover—or whether that sum will be sufficient to accomplish the State's interest in punishment and deterrence. Defense counsel will be wholly unable to defend against plaintiffs' amorphous claim for punitive damages, because individual discovery has been relegated to Phase II: during Phase I, petitioners will not be able to cross-examine individual plaintiffs or present their affirmative defenses. And the Phase II juries will apply the Phase I findings to the cases of all the plaintiffs who can prove their claims for compensatory liability and damages—regardless of whether those individuals were harmed by the conduct that formed the basis of the first jury's imposition of punitive liability and damages.

West Virginia's approach to the determination of punitive liability and punitive damages in mass-tort litigation is foreclosed by this Court's decisions in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003) and *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057 (2007). In those

two cases, this Court held that, because the Due Process Clause abhors the "arbitrary determination" of punitive damages, the proceedings must ensure that a jury has the information necessary to exercise its powerful discretionary authority in a rational way. *Williams*, 127 S. Ct. at 1062. The trial plan at issue here—which the West Virginia Supreme Court of Appeals described as a "common" feature of mass-tort litigation in that State—ensures the opposite.

First, the Phase I jury will not know (i) whether the conduct it has heard about actually harmed any plaintiff; (ii) the severity of any injury that resulted; (iii) which defendants—if any—are responsible for that harm; or (iv) the total amount of compensatory damages owed to the plaintiffs by any defendant. Punishment imposed in this manner cannot possibly be grounded in the facts of the actual suit before the court, as due process requires; rather, it will inevitably be based upon "the merits of other parties' hypothetical claims against a defendant." *State Farm*, 538 U.S. at 423; see also *Williams*, 127 S. Ct. at 1063. The punishment will thus reflect nothing more than the jury's view that a particular defendant is "an unsavory individual or business" with substantial financial resources—precisely the result that due process forbids. *State Farm*, 538 U.S. at 422-23. And because the Phase I jury will have no information about the total amount of compensatory damages owed to the plaintiffs by any defendant, it cannot possibly determine whether "the defendant's culpability, *after having paid compensatory damages*, is so reprehensible as to warrant the imposition of further sanctions." *State Farm*, 538 U.S at 419 (emphasis added).

Second, the Phase I jury's findings will subsequently be applied in the trials of *all* of the plaintiffs. Accordingly, the plaintiffs who were not harmed by the conduct that the Phase I jury found egregious will still see their proven compensatory damages enhanced by a multiplier that is based on the defendant's conduct toward other parties—a clear violation of this Court's "explicit" holding in *Williams* that "a jury may not punish for the harm caused others." 127 S. Ct. at 1065.

1. On September 28, 1999, the Chief Justice of the Supreme Court of Appeals for West Virginia entered an administrative order consolidating all tobacco-related personal injury suits then pending in West Virginia—more than 120 at that time—and transferring them to the Circuit Court of Ohio County for coordinated proceedings.[1] The court did not hold a class-certification hearing prior to aggregating the suits. Nor were the suits consolidated under W. Va R. Civ. P. 42(a), which would have required a determination that consolidation would "promote judicial economy and convenience of the parties, *and* avoid prejudice and confusion." *State ex rel. Appalachian Power Co.* v. *Ranson*, 438 S.E.2d 609, 610, Syl. Pt. 2 (W. Va. 1993) (emphasis added).[2]

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[1] The Circuit Court of Ohio County is a trial court. West Virginia has no intermediate appellate courts. A decision of a Circuit Court may be reviewed by West Virginia's highest court, the Supreme Court of Appeals, on direct appeal. Alternatively, as in this case, a party may petition for a writ of prohibition "to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers." *Crawford* v. *Taylor*, 75 S.E.2d 370, Syl. Pt. 1 (W. Va. 1953); W. Va. Code § 53-1-1.

[2] Cf. *State ex rel. Taylor* v. *Nibert*, 640 S.E.2d 192, 197 (W. Va. 2006) (granting extraordinary writ to reverse trial court order

Rather, these initial 120 claims were consolidated under West Virginia's special mass-tort procedure, Trial Court Rule 26.01, which allows consolidation on the basis of a showing that there are *some* "common issues of law or fact" and that consolidation will lead to an "expeditious" resolution of the claims.

More than 1,000 additional plaintiffs soon joined the consolidated proceeding. Their individual suits allege 24 different kinds of injuries, including various types of cancer; cardiovascular and coronary disease; peripheral vascular disease; and chronic obstructive pulmonary disease. Moreover, the complaints propose widely varying theories of liability, including strict liability, negligence, breach of express warranty, fraudulent concealment, and civil conspiracy. Plaintiffs allege that they used more than 200 different tobacco products—including many that were not even cigarettes—beginning at different points in time, and lasting for different durations. Thus, plaintiffs themselves claim that they were affected in dramatically different ways by dramatically different aspects of defendants' alleged conduct.

2. On January 11, 2000, the trial court issued a case management order. Over petitioners' objections, the trial court adopted the trial plan proposed by plaintiffs' counsel. This plan provided that "[a]ll personal injury tobacco cases for plaintiffs now pending, filed in, or transferred to and accepted by this Court * * * shall be included in a single consolidated trial in Ohio County * * * ." App. 69a (Trial Plan ¶ 1). The plan further ordered that a consolidated trial of hundreds of separate claims would be bifurcated

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consolidating plaintiffs' claims; the claims did not arise out of the same "transaction or occurrence" merely because the plaintiffs received the same deficient mailing from the defendant).

into multiple phases. In Phase I—without any consideration of any evidence concerning any actual plaintiff—the jury will first determine "general liability issues," including whether each defendant could be held liable on a theory of fraudulent concealment, negligence, product defect, or warranty. The Phase I jury will also determine "entitlement to punitive damages" and a multiplier, to be uniformly applicable to all successful plaintiffs regardless of the specifics of their claims. In Phase II, "issues unique to each plaintiff's" claim for compensatory damages will be tried before different fact-finders. App. 69a-70a (Trial Plan ¶ 3).

As the trial court's subsequent decisions have confirmed, no individual plaintiff's claims will be tried in Phase I. Almost no plaintiff-specific discovery has been permitted, and the Phase I jury will not be permitted to hear evidence concerning any particular plaintiff's case. That jury will not hear evidence or make findings, for example, regarding the reasons why any individual plaintiff began smoking, when and for how long he or she smoked, which defendant's cigarette brands (or other tobacco products) he or she used, whether any defendant influenced his or her smoking decisions, or what he or she understood about the health risks of smoking. The Trial Plan relegates any plaintiff-specific inquiry to Phase II—after the decision on punishment has already been rendered, and the one-size-fits-all multiplier conclusively established. App. 70a, 74a (Trial Plan ¶¶ 3, 6).

3. After this Court decided *State Farm* in 2003, petitioners asked the trial court to re-evaluate the constitutionality of the trial plan. The court vacated the plan on June 16, 2004 on the ground that asking

the jury to assess punitive damages in Phase I would violate defendants' due process rights. As the court explained:

> This Court has read and reread *Campbell* in an effort to determine whether there is any conceivable manner to salvage the extant Case Management Order and still accommodate the due process demands of *Campbell* to require any punitive damage award to punish and deter conduct that has a specific relationship to a specific injured party. It cannot be done.

App. 66a.

4. At respondents' request, the trial court subsequently agreed to certify the following question to the West Virginia Supreme Court of Appeals:

> Does the Due Process Clause of the Fourteenth Amendment to the Federal Constitution, as interpreted by *State Farm* v. *Campbell*, preclude a bifurcated Trial Plan in a consolidated action consisting of personal injury claims of approximately 1,000 individual smokers, wherein Phase I of the trial would decide certain elements of liability and a punitive damages multiplier and Phase II of the trial would decide for each plaintiff compensatory damages and punitive damages based upon the punitive damages multiplier determined in Phase I?

App. 43a.

West Virginia's high court answered the certified question in the negative, holding that it could find "nothing in [*State Farm*] that per se precludes a bifurcated trial plan in which a punitive damages mul-

tiplier is established prior to the determination of individual compensatory damages." *In re Tobacco Litig.*, 624 S.E.2d at 741. Reading *State Farm* as a narrow decision, based on "extreme" facts (*id.* at 742), the court rejected the trial court's contrary conclusion that *State Farm* requires an "analysis of the defendant's conduct vis-à-vis a specific plaintiff" and thus "requires that the defendant's conduct be tailored to each plaintiff." *Ibid.* In any event, in the Supreme Court of Appeals' view, post-verdict excessiveness review by the trial court could cure any constitutional error associated with the structure of the proceedings. *Id.* at 743.

5. On remand, the trial court had this to say about the high court's interpretation of *State Farm*: "I still don't think I was wrong * * * when I got the opinion from the West Virginia Supreme Court, quite frankly, I just went back, and I said they don't want to really hear it. * * * Now, I'm not saying they have answered the particular conundrum, maybe, that we have. I don't think that." 12/14/2006 Hearing Tr. at 27-28. Nevertheless, over petitioners' objections, the circuit court reinstated the original trial plan. See 4/3/2006 Hearing Tr. at 13-15, 36, 38. Despite the court's continuing concerns that the trial plan would not pass muster under *State Farm*, it made clear that it would *not* attempt to ensure that Phase I would be limited to purported common issues and common evidence. 12/14/2006 Hearing Tr. at 29. As a result, as respondents' counsel has conceded, "some of the issues that we will try surely will not apply to everyone. *Maybe some of them won't apply to anyone* * * *." 9/18/2007 Hearing Tr. at 33 (emphasis added).

6. On February 20, 2007, this Court issued its decision in *Philip Morris USA* v. *Williams*. Petitioners again moved to vacate the trial plan, arguing that *Williams*—which held "explicitly that a jury may not punish for the harm caused others" and affirmatively requires States to "protect against [the] risk" that juries will seek to punish the defendant for having caused "harm to others," 127 S. Ct. at 1063, 1065—made the unconstitutionality of West Virginia's trial plan even more plain than had *State Farm*. The trial court denied petitioners' motion on May 23, 2007, App. 24a, and, on August 17, 2007, reaffirmed its decision to go forward with the bifurcated trial plan, App. 12a-14a.

7. Petitioners then filed a petition for a writ of prohibition in the Supreme Court of Appeals of West Virginia, seeking to bar the trial court from "having one jury determine a single uniform punishment (a punitive damages multiplier) for all Plaintiffs first, and having other juries determine liability, defenses, and compensatory damages for individual plaintiffs later." Writ Petition at 1. Citing *State Farm* and *Williams*, petitioners explained that this trial plan would violate their due process rights by allowing the jury to impose punishment before petitioners' liability to any claimant had been established and the extent of the compensatory damages fixed. Additionally, petitioners argued that under *Williams*, a single punitive damages multiplier could not be applied to every case because plaintiffs claim to have been injured in different ways and by different aspects of the defendants' conduct. As petitioners explained:

> evidence in support of claims of concealment or failure to warn of the risks of smoking

> cannot be the basis of punitive damages for those Plaintiffs aware either of the risks of smoking or of the facts supposedly concealed. Evidence of the so-called "Frank Statement" [an advertisement published in 1954] * * * cannot be the basis of punitive damages for Plaintiffs who never saw it—indeed, were not even born or could not yet read when the advertisement was published.[3] Evidence of other cigarette advertisements cannot be the basis of punitive damages for Plaintiffs who never saw or heeded them. * * * The list goes on and on.

Writ petition at 12-13 (footnotes omitted).

Given the disparate nature of the plaintiffs' claims, and the aggregated evidence that will be admitted in Phase I, petitioners also argued that there would be no way to ensure that the Phase I jury's findings would bear the constitutionally-mandated nexus to the harm done to each plaintiff who would receive punitive damages based on those findings. The West Virginia Supreme Court of Appeals denied the petition without comment in an order dated November 7, 2007, over the dissent of one justice of the court. App. 1a-2a.

REASONS FOR GRANTING THE PETITION

West Virginia's approach to adjudicating mass-tort cases is deeply and fundamentally flawed.

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[3] The "Frank Statement" was a "full-page advertisement signed by the four defendant cigarette manufacturers that was published in the 448 American newspapers serving cities with populations of more than 25,000 people." *Insolia* v. *Philip Morris Inc.*, 216 F.3d 596, 602 (7th Cir. 2000).

Driven by the apparent desire to clear the state's dockets of pending claims, West Virginia's high court has adopted a "system of mass tort litigation" (see *In re Tobacco Litig.*, 624 S.E.2d 738, 741 (W. Va. 2005)) that is patently unconstitutional. Under this "system," disparate claims are consolidated and then tried in a reverse-bifurcated structure that requires the jury to assess punishment before the defendant's liability to any plaintiff has been established. This approach to the adjudication of mass-tort cases cannot be reconciled with this Court's punitive-damages jurisprudence, both because it requires the jury to impose punishment without the information it would need to exercise its discretion in a rational way, and because due process does not permit the application of a one-size-fits-all multiplier to plaintiffs who claim to have been injured in various ways, to varying extents, and by varying conduct. It is also at odds with the decisions of other courts. Despite the clear constitutional infirmities of this model, West Virginia employs it with increasing frequency. And because most of the defendants subjected to it are quickly forced to settle, opportunities for this Court to intervene are—and will continue to be—rare. This Court should grant certiorari now to bring West Virginia's mass-tort litigation system into compliance with constitutional standards.

I. WEST VIRGINIA'S APPROACH TO ASSESSING PUNITIVE DAMAGES VIOLATES DUE PROCESS.

A. West Virginia's Approach Cannot Be Reconciled With *State Farm* And *Williams*.

West Virginia's approach to assessing punitive damages in mass-tort cases is incompatible with this

Court's punitive damages decisions, particularly *State Farm* and *Williams*. Those decisions have emphasized that (i) punishment must be narrowly focused on the defendant's conduct toward the plaintiff, *Williams*, 127 S. Ct. at 1065; *State Farm*, 538 U.S. at 423; (ii) punishment may be imposed only after a defendant has had a full "opportunity to defend against the charge," *Williams*, 127 S. Ct. at 1063; and (iii) punishment should be imposed only when the plaintiff's proven compensatory damages are insufficient to serve the state's objectives of deterrence and punishment. *State Farm*, 538 U.S. at 419.

A trial court has an affirmative obligation to protect against "an unreasonable and unnecessary risk" that a defendant will be punished for harms to parties other than the plaintiff, or for conduct other than that which harmed the plaintiff. *Williams*, 127 S. Ct. at 1065; see also *State Farm*, 538 U.S. at 422-23. The trial plan here does not merely fail to *protect* against such a risk—it guarantees that it will materialize.

1. The Phase I Jury's Findings Will Not Bear A Sufficient Nexus To The Conduct That Harmed Any Particular Plaintiff.

1. The question before the jury in Phase I will be whether each defendant engaged in conduct that warrants an award of punitive damages—which, under West Virginia law, means a "wrongful act" that was undertaken "maliciously, wantonly, mischievously or with criminal indifference to civil obligations." *Gen. Motors Acceptance Corp.* v. *D.C. Wrecker Serv.*, 647 S.E.2d 861, 867 (W. Va. 2007). In *State Farm*, this Court made clear that any such finding must rest on *the conduct that harmed the plaintiff before the court.*

> A defendant's dissimilar acts, independent from the acts upon which liability was premised, *may not serve as the basis for punitive damages*. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. * * * The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period.

538 U.S. at 422-24 (emphasis added). See also *id.* at 422 (to be relevant to the punitive damages inquiry, defendant's "conduct must have a nexus to the specific harm suffered by the plaintiff").

In this case, it will be impossible for the Phase I jury to evaluate each defendant's conduct toward the plaintiff before the court—because that jury will know *nothing* about *any* of the plaintiffs in this consolidated action. The trial court has made clear that the Phase I jury will not be given any information about even a single plaintiff. The Phase I jury will thus be left to hear only a generalized, aggregated presentation about petitioners' conduct over half a century.

The suits consolidated in this case present a pastiche of widely varying claims brought by a broad array of West Virginia smokers. Some respondents started smoking before World War II, many others in the 1950s and 1960s, and others as late as the 1980s. Some smoked only "regular" cigarettes, while others smoked only "light" cigarettes; and others still smoked both. Some claim to have started smoking while young, others only after they reached adulthood. Some plaintiffs claim that they were addicted

to cigarettes, and others deny that they were unable to stop. Some plaintiffs claim that smoking caused them to develop cancer; others claim that it caused them to develop tooth decay. And the list goes on. Because of these disparities, plaintiffs assert—and the trial court has agreed—that they must present evidence covering a half-century of defendants' conduct in order to address the facts that are alleged to have injured each of the hundreds of plaintiffs before the court. But as respondents also belatedly concede, "some of the issues that we will try surely will not apply to everyone. *Maybe some of them won't apply to anyone* * * *." Sept. 18, 2007 Hearing Tr. at 33 (emphasis added).

Thus, any finding that one or more of petitioners engaged in conduct giving rise to liability for punitive damages will necessarily rest on a retrospective view of petitioners' conduct over a fifty-year period, not on the conduct that harmed any individual. This procedure clearly raises a risk that the court will ultimately "award[] punitive damages to punish and deter conduct that bore no relation to the [plaintiffs'] harm," *State Farm*, 538 U.S. at 422, because neither the defendants nor court nor the jury will have any way of identifying the "acts upon which liability is premised." *Id.* at 422. It is difficult to imagine a trial plan that would more effectively guarantee that any verdict in plaintiffs' favor will reflect nothing more than the jury's view that a particular defendant is "an unsavory individual or business." *Id.* at 423. This is precisely what the Due Process Clause forbids.

The trial plan also precludes petitioners from defending themselves against plaintiffs' punitive damages claims. As in many West Virginia mass-tort

cases, the trial plan bars "[d]iscovery relevant to Phase II issues" until "*after* [the Phase I] consolidated trial of the common issues." App. 74a (Trial Plan ¶6) (emphasis added). Nor will defendants be able to cross-examine any individual plaintiffs or raise any affirmative defenses during Phase I. Thus, neither defendants nor the Phase I jury will have any idea, for example, how many of the plaintiffs "knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary." *Williams*, 127 S. Ct. at 1063. This curtailment of defendants' opportunity to oppose plaintiffs' claims is a due process violation in and of itself. *Ibid.* ("the Due Process Clause prohibits a State from punishing an individual without *first* providing that individual with 'an opportunity to present every available defense.'") (emphasis added).

2. The jury's determination of a punitive-damages multiplier in Phase I(A) will, like the Phase I verdict, rest on an evidentiary showing that will be at once overbroad and incomplete. The jury necessarily will be speculating about the number of victims that were actually harmed by each defendant; the extent of their injuries; the extent to which those injuries were actually caused by the defendant's alleged wrongful conduct (as opposed to the risks inherent in smoking cigarettes); and the nature of the particular wrongful conduct that harmed each plaintiff. All of those factors are key to a proper assessment of the relative reprehensibility of a defendant's conduct—"the most important indicium of the reasonableness of a punitive damages award." *BMW of N. Am. Inc.*, v. *Gore*, 517 U.S. 559, 575 (U.S. 1996). As this Court explained in *State Farm*, "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties'

hypothetical claims against a defendant under the guise of the reprehensibility analysis * * *." 538 U.S. at 423. Here, the jurors will be considering *solely* "the merits of other parties' hypothetical claims," because they will know nothing at all about the claims of the actual plaintiffs.

In *State Farm*, moreover, this Court explained that where the defendant's compensatory liability is large, the imposition of *any* award of punitive damages may be unwarranted and unconstitutional. "It should be presumed that a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability * * * is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." 538 U.S. at 419. The Phase I jury, of course, will have no way to know, or even guess, the amount of compensatory damages that will ultimately be paid to the plaintiffs. Accordingly, it will be impossible for that jury to determine whether, and to what extent, additional sanctions are necessary or appropriate. Cf. *White* v. *Ford Motor Co.*, 500 F.3d 963, 974 (9th Cir. 2007) (holding that Nevada law required a jury hearing a punitive-damages retrial to be told the amount of compensatory damages that the first jury had awarded: "Without knowing the amount of those damages, the punitive damages jury could not have come to a reasoned conclusion as to the amount of additional damages necessary to deter Ford from similar conduct in the future.").

2. The Application Of A Uniform Multiplier To Disparately-Situated Plaintiffs Violates Due Process.

This Court's decisions do not countenance the application of a one-size-fits-all multiplier to plaintiffs allegedly harmed by different aspects of petitioners' past conduct. *Williams*, 127 S. Ct. at 1065 (holding "explicitly that a jury may not punish for the harm caused others"); *State Farm*, 538 U.S. at 425 ("[t]he precise [punitive] award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff"). In this case, the vast disparities among respondents' claims will make it impossible to ensure in each Phase II trial that the relevant defendant is being punished because, and to the extent that, the Phase I jury found the defendant's conduct toward *this particular plaintiff* to be reprehensible.

For example, imagine that the jury found that petitioners' allegedly misleading statements to the public about the health effects of "light" cigarettes merited the imposition of punishment and a particular punitive damages multiplier. The across-the-board application of that multiplier would result in the imposition of punitive damages on behalf of respondents who never smoked "light" cigarettes—the vast majority of them—and therefore could not have been harmed by that conduct. The same would be true if the multiplier were based in part on the petitioners' use of particular advertisements: under *Williams*, that conduct could not lawfully be the basis for awarding punitive damages to respondents who never viewed those ads. Likewise, evidence of alleged marketing to youth cannot lawfully form the

basis for awards of punitive damages to plaintiffs who started smoking as adults.

Imposing a rigid multiplier before compensatory damages are ascertained also violates due process by ignoring that the constitutionally permissible relationship between punitive and compensatory damages varies with the actual size of the compensatory award. This Court has held that, in most cases, the maximum allowable penalty will run from zero to nine times the amount of compensatory damages. *State Farm*, 538 U.S. at 423-25. Because compensatory damages serve a deterrent purpose, the size of the compensatory award is (along with the reprehensibility of the defendant's conduct toward the plaintiff) a key factor in gauging the maximum constitutionally permissible ratio of punitive to compensatory damages: in most cases, the maximum ratio will be inversely proportional to the size of the compensatory award. Indeed, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* at 425. In contrast, more extreme punitive damages multiples are reserved for cases in which "'a particularly egregious act has resulted in only a small amount of economic damages.'" *Ibid.* (quoting *BMW*, 517 U.S. at 582). Here, however, the ratio will be determined in advance, without any knowledge of the size of the compensatory damages.

Thus, when a uniform punitive damages multiplier is determined before a finding of compensatory damages, it *guarantees* an unconstitutional result. That procedure deprives the jury and the reviewing court of the ability to make the contextual, individualized decision about the size of a punitive damages

award that due process requires. See, *e.g.*, *Philip Morris Inc.* v. *Angeletti*, 752 A.2d 200, 249 (Md. 2000) ("Mere widespread, identical proportionality between actual damages and punitive damages for such a multitude of plaintiffs would not necessarily encapsulate the relation between the two types of damages deemed requisite under this State's common law," which applies functionally the same analysis as federal constitutional law).

B. The Decision Below Conflicts With Rulings Of The Second Circuit And Other Courts.

The decisions in this case directly conflict with the Second Circuit's decision in *In re Simon II Litigation*, 407 F.3d 125 (2d Cir. 2005). In that case, the court of appeals rejected a trial plan that called for the litigation of punitive liability and punitive damages prior to any determination of compensatory liability or compensatory damages to individual plaintiffs. The court observed that under *State Farm*, "punishment on any basis that does not have a nexus to the specific harm suffered by the plaintiff' is unconstitutional. *Id.* at 139. The district court's trial plan, under which the jury would have estimated total harm to the class and then imposed an aggregate award of punitive damages, raised the risk of such punishment because it failed to account for the differences among plaintiffs. *Id.* at 138.

The Fifth Circuit, too—even before *State Farm*—held that, in a case like this one, punitive damages cannot be litigated prior to a determination of compensatory liability and damages. Because consideration of "punitive damages requires individualized proof and determinations," "punitive damages must be determined after proof of liability to individual

plaintiffs at the second stage of a [Title VII] pattern or practice case, not upon the mere finding of general liability to the class at the first stage." *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 418 (5th Cir. 1998). See also *Colindres* v. *QuietFlex Mfg.*, 235 F.R.D. 347, 377 (S.D. Tex. 2006) ("[P]unitive damages cannot be assessed without proof of liability to individual class members.") (citing *Allison*).

Similarly, the Court of Appeals of Maryland firmly rejected a trial plan similar to that at issue here—albeit on state law grounds. Maryland's high court explained that the plan would

> not enable the jury to properly assess the amount of punitive damages that are appropriate in specific relation to differing amounts of—and reasons for—actual damages. * * * Under the Circuit Court's decision * * * the punitive damages determination would be made *before* any finding of liability to any class member, in the absence of any evidence that defendants' conduct actually caused any class member's alleged injury, and without any knowledge of how much, if any, compensatory damages would be awarded to any class member by *other* juries who would never hear the Phase I evidence.

Angeletti, 752 A.2d 200 at 249 (internal quotation marks omitted). See also *id.* at 245 (noting that the trial plan called for a punitive-damages multiplier to be used).

The Florida Supreme Court also recently concluded that a punitive damages phase cannot be conducted prior to the resolution of questions pertaining

to the defendant's liability to the plaintiff. It therefore vacated a massive punitive damages award erroneously imposed by a Phase I jury. See *Engle* v. *Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (per curiam), *cert. denied*, 128 S. Ct. 96 (2007). Though petitioners firmly believe that aspects of the *Engle* decision were fundamentally erroneous, the Florida Supreme Court clearly and correctly rejected the view that a class-wide punitive damages phase may be conducted before the defendant's compensatory liability to any plaintiff has been established. The Florida high court found that this trial plan violated both state law and principles of federal due process, writing that "[i]t was error for the trial court to allow the jury to consider entitlement to punitive damages before the jury found that the plaintiffs had established causation and reliance." 945 So. 2d at 1263. Moreover, "without having total compensatory damages determined it would be impossible to determine whether punitive damages bear a 'reasonable' relationship to the actual harm inflicted on the plaintiff." *Id.* at 1265 (internal quotation marks omitted).

Several federal district courts have likewise held, especially post-*State Farm*, that an assessment of punitive damages must be tailored to each individual plaintiff's injury, and thus cannot precede a determination of compensatory liability and damages. In *In re Baycol Products Litigation*, 218 F.R.D. 197 (D. Minn. 2003), a mass-tort case against a pharmaceutical company, the district court rejected a class action trial plan that was, in relevant respects, functionally identical to the plan approved below, holding that such a structure would violate due process:

> To succeed on a punitive damages claim, a plaintiff must prove that the defendant's con-

> duct toward him/her rises to the level required by law. * * * [A] determination of punitive damages is based on individual issues. * * * Plaintiffs' proposed class trial on punitive damages poses * * * due process concerns because the conduct upon which Plaintiffs would base their punitive damages claim is not specific to a particular plaintiff[']s claim."

Id. at 215.[4]

West Virginia's "common" and unconstitutional approach to the litigation of punitive damages claims in mass-tort cases is in conflict with the decisions of this Court and with the rulings of other courts. This Court's immediate review is warranted.

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[4] Accord *Nelson* v. *Wal-Mart Stores, Inc.*, 245 F.R.D. 358, 378 (E.D. Ark. 2007) (punitive damages could not be determined on a classwide basis prior to individualized assessments of harm and compensatory damages: "Individualized determinations are necessary to fully realize the extent of the harm caused by Wal-Mart's conduct and properly assess the need for punishment and deterrence"); *O'Neal* v. *Wackenhut Servs., Inc.*, No. 3:03-CV-397, 2006 WL 1469348 at *22 (E.D. Tenn. May 25, 2006) (pursuant to *State Farm*, "a determination of punitive damages would require each plaintiff to demonstrate how the discrimination affected him or her individually. As defendant points out, proof of damages must be related to the harm to the plaintiff. To hold otherwise would violate defendant's rights to due process and would improperly eliminate the jury's discretion to assess punitive damages under the Seventh Amendment").

II. THIS COURT SHOULD GRANT REVIEW IN ORDER TO HALT WEST VIRGINIA'S REPEATED AND UNCONSTITUTIONAL USE OF REVERSE BIFURCATION TO RESOLVE AGGREGATED PUNITIVE-DAMAGES CLAIMS IN MASS-TORT LITIGATION.

A. The West Virginia Supreme Court Of Appeals Has Made Clear That It Will Continue To Place Expediency Over Concerns Of Due Process In Mass-Tort Litigation.

West Virginia's use of its upside-down procedure in this case is no one-time event. On the contrary, as the West Virginia Supreme Court of Appeals itself has explained, "bifurcated trial plans structured like the one at issue [in this case] are *common* in West Virginia." *In re Tobacco Litig.*, 624 S.E.2d at 742 (emphasis added). The reported cases confirm that in recent years, the West Virginia courts have turned to the aggregation and front-loading of punitive-damages claims as a means of streamlining mass-tort litigation.[5] This approach to assessing punitive

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[5] See, *e.g.*, *State ex rel. Chemtall Inc.* v. *Madden*, No. 33380, 2007 WL 4098937 (W. Va. Nov. 15, 2007) (per curiam) (approving a similar multi-phase trial plan to govern a consolidated action: "[t]he first phase of the trial will involve liability and whether the Defendants' actions and/or inactions justify punitive damages, and if so, what multiple of general damages will be assessed as a punitive damage multiplier as to each Defendant * * *. Should Plaintiffs prevail on the issue of liability, the parties will proceed in the second phase to try the issues of medical causation, medical monitoring viability, and damages.") (internal quotation marks omitted); Petition for Writ of Certiorari at 5, 10, *Union Carbide Corp.* v. *Recht*, No. 03-319, 2003 WL 22428919 (U.S. Aug. 22, 2003) (detailing that under the trial plan, "punitive damages were assessed by the Phase I

damages awards is just one in a laundry list of reasons why the West Virginia courts have earned widespread criticism for their treatment of corporate defendants.[6]

This Court should grant certiorari in order to make express what already should be clear from its decisions in *State Farm* and *Williams*—the "common" trial procedure employed in this case does not comport with the requirements of the Due Process Clause. West Virginia has stated quite clearly that it will not amend its "existing system of mass tort litigation" until it receives a "clear indication" from this Court that it must. *In re Tobacco Litig.*, 624 S.E.2d at 741-42. And the decisions below demonstrate that its courts do not view the facial incompatibility of its current procedures with the teachings of this Court in *State Farm* and *Williams* as sufficient for that purpose.

In fact, members of West Virginia's high court appear inclined to work around, restate, or simply ignore this Court's ruling in *State Farm*: "As the

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jury," with "thousands" of individual liability trials scheduled to follow); *State ex rel. Appalachian Power Co.* v. *MacQueen*, 479 S.E.2d 300, 304-05 & n.9 (W. Va. 1996) (calling for similarly bifurcated plan).

[6] See, *e.g.*, Michael P. Addair, *A Small Step Forward: An Analysis of West Virginia's Attempt At Joint And Several Liability Reform*, 109 W. VA. L. REV. 831, 833 n.9 (2007); Brian Dorsey, *The Good, the Bad, and the Ambiguous: Recent Developments in West Virginia's Class Action Jurisprudence*, 107 W. VA. L. REV. 261, 262 n.1 (2004) (citing *'Judicial Hellhole' Label Not Unfair*, THE INTELLIGENCER WHEELING NEWS-REGISTER, Nov. 9, 2003, at C4); Editorial, *The Asbestos-Fraud Express*, WALL ST. J., June 2, 2006, at A18; Petition for Writ of Certiorari at 15, *Daniel Measurement Servs.* v. *Eagle Research Corp.*, No. 07-384, 2007 WL 2736284, (U.S. Sept. 19, 2007).

members of this Court have noted before, *State Farm* v. *Campbell* * * * was nothing more than a summary, a collation, of prior case law." *In re Tobacco Litig.*, 624 S.E.2d at 749 (Starcher, J., concurring) (citing cases). See also, *e.g.*, *Jackson* v. *State Farm Mut. Auto. Ins. Co.*, 600 S.E.2d 346, 367 (W. Va. 2004) (McGraw, J., concurring) (opining that in *State Farm*, "the majority of the nine justices did not focus on 'the degree of reprehensibility of the defendant's conduct,' but instead chose to substitute the jury's judgment with their own. * * * It is not ours to judge whether the high Court did the right thing in reducing the 145 million dollar award in *Campbell*, but it is vital that we not be blinded by the sheer size of an award when considering its validity.") (citation omitted).[7] See also *id.* at 654 (Maynard, C.J., concurring in part and dissenting in part) ("I fervently hope that the next time a punitive damages award is reviewed by this Court, the majority will abide by the United States Supreme Court's decision in *Campbell*, even if it does not like or agree with *Campbell*'s holdings. The rule of law demands that ordinary citizens follow laws with which they do not agree. Likewise, we as judges are bound by controlling legal precedent. *Campbell* is the law of the land, and it must be ap-

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[7] See also *Boyd* v. *Goffoli*, 608 S.E.2d 169, 188 (W. Va. 2004) (Starcher, J., concurring) ("[W]hen examined objectively, [*State Farm*] was not a significant decision by the U.S. Supreme Court."); *Kocher* v. *Oxford Life Ins. Co.*, 602 S.E.2d 499, 505-06 (W. Va. 2004) (per curiam) (McGraw, J., dissenting) (stating that the *State Farm* majority "foolishly" had "adopted this overt fear of large numbers" and that "[t]he majority opinion deserves credit for not openly embracing the seductively simple arguments of *Campbell* and *Gore*, but I fear some of that logic has affected the decision to reverse this case.").

plied everywhere in the United States, including in West Virginia.").

It is not a stretch to suggest that in managing mass-tort cases the West Virginia courts have privileged "flexibility" (see *State ex rel. Mobil Corp.* v. *Gaughan*, 563 S.E.2d 419, 424 (W. Va.) (per curiam), *cert. denied*, 537 U.S. 944 (2002)) above due process. In the words of one justice of the West Virginia Supreme Court of Appeals, "what process is due is *entirely* dependent upon the trial judge's *discretion*." *In re Tobacco Litig.*, 624 S.E.2d at 744 (Starcher, J., concurring) (emphasis added). This view that the Due Process Clause places no meaningful limitations on how courts may conduct mass-tort litigation proceedings is totally at odds with settled constitutional principles. As many other courts have recognized, the requirements of the Due Process Clause cannot be set aside simply because plaintiffs have filed numerous cases in one jurisdiction. On the contrary, it is precisely these "'considerations of convenience and economy [which] must yield to a paramount concern for a fair and impartial trial.'" *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993) (quoting *Johnson* v. *Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990)).

Accordingly, courts outside West Virginia have recognized that "[t]he systematic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation." *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992). See also *In re Ethyl Corp.*, 975 S.W.2d 606, 613 (Tex. 1998) (quoting same); *Cain* v. *Armstrong World Indus.*, 785 F. Supp.

1448, 1456-57 (S.D. Ala. 1992) ("The congestion these [asbestos] cases caused in this district for all civil litigants gives one a skewed view of how to resolve the problem. The 'Try-as-many-as-you-can-at-one-time' approach is great if they all, or most, settle; but when they don't, and they didn't here, [plaintiffs get] a chance to do something not many other civil litigants can do—overwhelm a jury with evidence.").

Indeed, here, as in many other mass-tort cases, West Virginia's courts have aggregated hundreds of disparate cases without attempting to satisfy the standards for certification of a class action. Among those standards is the requirement that common issues must predominate over individual ones. W. Va. R. Civ. P. 23(b). The West Virginia courts have also exempted mass-tort cases from even the typical claims consolidation analysis under W. Va. R. Civ. P. 42(a), which requires (*inter alia*) a showing that considerations of judicial economy outweigh the potential prejudice and confusion.[8]

Instead, the West Virginia Supreme Court of Appeals may order mass-tort cases consolidated pursuant to W. Va. Tr. Ct. R. 26.01, under which the consolidation inquiry is exempt from "case law * * * address[ing] issues of joinder, class action, and consolidation." *State ex rel. Allman* v. *MacQueen*, 551 S.E.2d 369, 374 (W. Va. 2001) (per curiam). Rule 26.01 consolidation is governed by no standard in-

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[8] Smoking-and-health claims cannot be consolidated under Fed. R. Civ. P. 42(a). See, *e.g.*, *Clinton* v. *Brown & Williamson Holdings, Inc.*, Nos. 05 Cv. 9907, 05 Cv. 9908, 05 Cv. 9174 (CB), 2007 WL 2161778 (S.D.N.Y. July 25, 2007) (remaining "common questions of law and fact do not overcome the risk of jury confusion and possible prejudice to the separate defendants if the Court were to consolidate this action for trial purposes.").

quiry at all; its express purpose is to "permit[] the use of innovative means of trial management concerning issues unique to mass litigation, which would in turn encourage a more expeditious resolution of these matters than that permitted by traditional means of case resolution." *Ibid.* The Chief Justice of the West Virginia Supreme Court of Appeals invoked that rule here.[9]

Soon after the high court issued its order consolidating the cases, the number of claims ballooned from roughly 120 to over 1,200, many of which have subsequently been dismissed because the plaintiffs failed to meet the court's basic procedural requirements. Presumably, the number of cases remains grossly inflated, because many additional claims suffer from various irremediable flaws that will be discovered only after Phase I is over. Accordingly, one of the few tangible facts the jury will be told about the plaintiffs—the number of claimants—will be misleading.

In sum, petitioners now face a premature, aggregated punitive damages proceeding in a case involving disparate claims, injuries and facts—a case that therefore never could have been certified as a class action.[10] The Due Process Clause and this Court's precedents demand more. This Court should grant review in order to make clear that West Virginia

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[9] The trial court subsequently denied petitioners' request for a hearing to determine whether the pending cases presented common issues of law or fact.

[10] For these reasons, courts around the country have refused to grant class certification in smoking-and-health related cases. See, *e.g.*, *Engle* v. *Liggett Group, Inc.*, 945 So. 2d 1246, 1267 n.9 (Fla. 2006) (collecting cases).

must revise its mass-tort litigation system to comport with due process. See, *e.g.*, *Lilly* v. *Virginia*, 527 U.S. 116, 123 (1999) (certiorari granted because state court's decision "represented a significant departure from [the United States Supreme Court's] Confrontation Clause jurisprudence").

B. Immediate Review Is Warranted.

Certiorari is warranted because the trial plan approved by the West Virginia courts cannot be reconciled with this Court's decisions in *State Farm* and *Williams*, see S. Ct. R. 10(c). And this Court plainly has jurisdiction to review the lower court's denial of petitioners' request for a writ of prohibition. See *Bd. of Educ.*, 448 U.S. at 1345-46; *Madruga*, 346 U.S. at 557 n.1. Moreover, the circumstances of this case demonstrate that the optimal *time* for review is now. The constitutional violation is complete: the trial that is set to begin on March 18, 2008 will be irreparably flawed from the outset. The deficiencies in the trial plan go to the very heart of the Phase I jury's decision-making: that jury will be deprived of the most fundamental information that should form the basis for its verdict. Accordingly, there is no way to salvage its findings. Unless this Court acts, those findings will be carried forward into hundreds of Phase II trials, conducted before different finders of fact in numerous West Virginia courtrooms. See App. 70a (Trial Plan ¶3(b)) (in Phase II, "[e]ither separate individual juries, judge or judges will independently address issues unique to each plaintiff's compensatory damages and any other individual issues in reasonably sized trial groups or on an individual basis").

Because of the flaws in this trial plan, there is no possible way in which any punitive damages judg-

ment obtained by any plaintiff in this case could be consistent with due process. Accordingly, although this Court in theory could postpone its consideration of this due process question while hundreds of separate Phase II proceedings wend their way through the courts, that course of action would entail years of unnecessary delay and expense for the parties to this case and the West Virginia courts. It would be provident for this Court instead to exercise its jurisdiction over the decision denying petitioners' request for a Writ of Prohibition now. *E.g.*, *United States* v. *Centennial Sav. Bank FSB*, 499 U.S. 573, 578 n.3 (1991) (certiorari granted "in light of the significant number of pending cases" affected).

Immediate review is also warranted because the damage done in Phase I—the jury's assessment of a punitive damages award by an unconstitutional procedure—cannot be undone through post-verdict or appellate review. Post-trial remedies like remittitur allow a court only to reduce excessive damages to the maximum amount permissible under the Constitution. See, *e.g.*, *Cont'l Trend Res., Inc.* v. *OXY USA Inc.*, 101 F.3d 634, 643 (10th Cir. 1996). But remittitur cannot cure a fundamentally-flawed trial plan like this one. The reason is simple: a jury that heard only relevant and admissible evidence that bore a nexus to the injuries of the plaintiffs before the court, that had the opportunity to consider defendants' affirmative defenses, and that knew the total amount of compensatory damages that will ultimately be recovered in this litigation, might well award far *less* than the maximum punishment allowed by the Constitution.[11] See *Merrick* v. *Paul Revere Life Ins. Co.*,

[11] Indeed, this Court has reached this conclusion in the context of criminal sentencing. See *Hicks* v. *Oklahoma*, 447 U.S. 343,

500 F.3d 1007, 1018 (9th Cir. 2007) (remittitur can remedy excessiveness, but it is inappropriate "where the constitutional error stems from misguidance regarding the way the jury may use evidence in setting an amount"); *White*, 500 F.3d at 972-73 (concluding that a new trial on punitive damages, rather than remittitur, is the "proper remedy" for a due process violation); *Ramirez* v. *New York City Off-Track Betting Corp.*, 112 F.3d 38, 40 (2d Cir. 1997) ("If * * * the record establishes that the jury's verdict on damages was not only excessive but was also infected by fundamental error, remittitur is improper. In such a case, the judgment of the district court should be vacated and the cause remanded for a new trial on damages.") (citation omitted). Given the insufficiency of the remittitur remedy in these circumstances, the practical difficulties that would be created if this Court were to postpone consideration of this case and only later declare West Virginia's trial plan unconstitutional would be enormous.

Finally, immediate review is warranted in light of the well-recognized fact that the extreme settlement pressures presented in mass-tort cases of this kind mean that very few such cases are ever tried to a jury verdict. See, *e.g.*, *In re Chevron USA, Inc.*, 109 F.3d 1016, 1022 (5th Cir. 1997) (Jones, J., specially concurring) (noting that a trial court's case management decisions in mass-tort cases are not often "effectively reviewable after trial" because defendants

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346 (1980) (where State amended its habitual offender statute, defendant sentenced under old statute was entitled to new trial on the appropriate sentence: "Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh as" the one it imposed under the invalid statute).

face "enormous" settlement pressures even when the odds of an adverse verdict are slim); Petition for Writ of Certiorari at 28, *Mobil Corp.* v. *Adkins*, No. 02-132, 2002 WL 32134868 (U.S. July 24, 2002) ("Given the enormous potential liability that mass aggregations pose for defendants, combined with scrutiny from financial markets, aggregated proceedings exert powerful pressure on defendants to settle even meritless cases."). This case thus presents this Court with a rare opportunity to consider the question whether a court may determine a defendant's liability for punitive damages before determining whether the defendant is legally responsible for any plaintiff's injuries or to pay compensatory damages to any plaintiff. The Court should take hold of this chance to provide much-needed guidance to the lower courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2007

APPENDIX

TABLE OF CONTENTS

Page

APPENDIX A: Order of the Supreme Court of Appeals of West Virginia (November 7, 2007) 1a

APPENDIX B: Order of the Circuit Court of Ohio County, West Virginia (August 28, 2007).....3a

APPENDIX C: Transcript of Hearing August 17, 2007 In the Circuit Court of Ohio County, West Virginia.....5a

APPENDIX D: Order of the Circuit Court for Ohio County, West Virginia (August 28, 2007).....15a

APPENDIX E: Transcript of Hearing May 23, 2007 In the Circuit Court of Ohio County, West Virginia.....17a

APPENDIX F: Opinion and Order of the Circuit Court of Ohio County, West Virginia (December 26, 2006).....28a

APPENDIX G: Opinion of the Supreme Court of Appeals of West Virginia (December 2, 2005) 31a

APPENDIX H: Opinion and Order of the Circuit Court of Ohio County, West Virginia (June 16, 2004) 66a

APPENDIX I: Case Management Order/Trial Plan of the Circuit Court of Ohio County, West Virginia (January 11, 2000).....70a

APPENDIX J: List of Plaintiffs With Claims Pending in Civil Action No. 00-C-5000 (December 13, 2007).....77a

APPENDIX K: List of Defendants Not Party To the Writ of Prohibition Proceeding In the Supreme Court of Appeals of West Virginia 110a

APPENDIX A
[Order of the Supreme Court of Appeals of West Virginia (November 7, 2007)]

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 7th of November, 2007, the following order was made and entered:

State of West Virginia ex rel. Philip Morris USA, Inc.; Brown & Williamson Holdings, Inc.; Lorillard Tobacco Company; and R.J. Reynolds Tobacco Company,

Petitioners,

Vs.) No. 072903

Honorable Arthur M. Recht, Judge of the Circuit Court of Ohio County, Chief of the Mass Litigation Panel and All Plaintiffs in In Re: 5000 Consolidated Matter,

Respondents.

On a former day, to-wit, September 27, 2007, came the petitioners, Philip Morris USA, Inc., by David B. Thomas, Pamela L. Campbell and Teresa K. Thompson, Allen Guthrie McHugh & Thomas, PLLC, its attorney; Brown & Williamson Holdings, Inc. and R.J. Reynolds Tobacco Company, by W. Henry Jernigan, Jr. and Brace R. Mullett, Dinsmore & Shohl, LLP, their attorneys; and Lorillard Tobacco Company, by Michael J. Farrell and Joseph M. Farrell, Jr., Farrell & Farrell, L.C., its attorneys, and presented to the Court their petition praying for a writ of prohibition to be directed against the

respondent, Honorable Arthur M. Recht, Judge of the Circuit Court of Ohio County, Chief of the Mass Litigation Panel, as therein set forth.

Thereafter, on the 24th day of October, 2007, pursuant to a request for a response under Rule 14(b) of the Rules of Appellate Procedure, came the respondent plaintiffs, by Cindy J. Kiblinger, James F. Humphreys & Associates, and Timothy N. Barber, their attorneys, and presented to the Court their initial response thereto.

Upon consideration whereof, the Court is of the opinion that a rule should not issue. It is hereby ordered that the petition for writ of prohibition prayed for by the petitioners is hereby refused. Justice Benjamin would grant.

A True Copy.

Attest: s/ Rory L. Perry

Clerk, Supreme Court of Appeals

APPENDIX B
[Order of the Circuit Court of Ohio County, West Virginia (August 28, 2007)]

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

IN RE: TOBACCO LITIGATION

(Individual Personal Injury cases)

Civil Action No. 00-C-5000

(Judge Arthur M. Recht)

ORDER

By agreement, a telephonic hearing was held August 17, 2007 on the issues raised in Defendants' Motion for an Order Setting Forth Findings of Fact and Conclusions of Law for the Purpose of Seeking an Extraordinary Writ from the Supreme Court of Appeals.

Upon the submissions and argument thereon, the court announced a denial of the motion and assigned as grounds therefor that the previous holdings on such issues provide an adequate articulation of necessary findings which include:

(1) The hearing held herein on December 14, 2006 and the resultant order entered December 26, 2006.

(2) The hearing held herein on May 23, 2007 and attendant order with attachment. Accordingly, it is hereby ORDERED:

(1) Defendants' Motion for an Order Setting Forth Findings of Fact and Conclusions of

Law for the Purpose of Seeking an Extraordinary Writ from the Supreme Court of Appeals is denied.

(2) A copy of the transcript of the hearing held August 17, 2007 shall be filed by plaintiffs' counsel upon its receipt and shall be a part of this order as a reflection of the court's holding.

Defendants' objections and exceptions are preserved.

Entered this 28th day of August, 2007.

s/ Arthur M. Recht

Judge Arthur M. Recht

A copy, Teste:

Brenda L. Miller

Circuit Clerk

Presented by:

/s Timothy N. Barber

Timothy N. Barber (WVSB #231)

Post Office Box 11746

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Counsel for Plaintiffs

APPENDIX C
[Transcript of Hearing August 17, 2007 In the Circuit Court of Ohio County, West Virginia]

IN THE CIRCUIT COURT OF OHIO COUNTY

STATE OF WEST VIRGINIA

IN RE: TOBACCO LITIGATION:

CASE NO. 00-C-5000

PERSONAL INJURY CASES

* * *

MOTIONS (via telephone)

* * *

Before: HON. ARTHUR M. RECHT

Monday, August 17, 2007

4:30 p.m.

* * *

Whereupon the above entitled matter came on for hearing before the Honorable Arthur M. Recht at the Ohio County Courthouse, Wheeling, West Virginia, and the proceedings were as follows:

* * *

APPEARANCES:

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and

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and

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and

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THOMAS SCHROEDER, Esquire

Womble Carlyle Sandridge & Rice, Post Office Drawer 84, Winston-Salem, North Carolina 27102

and

W. HENRY JERNIGAN, JR., Esquire

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ON BEHALF OF LIGGETT GROUP, INC., LIGGETT & MEYERS, INC., AND BROOKE GROUP LIMITED:

MARK TROY, Esquire

Bailey & Wyant, PLLC, 505 Capitol Street, Suite 1007, Post Office Box 3710, Charleston, West Virginia 25337

* * *

PROCEEDINGS

* * *

THE COURT: We're on the record now, and then, one more time, if we can, first for the plaintiffs, why don't you just state your full name. I will say

that, when you speak, if you can just identify yourself each time you speak, that way we can have you down on the record. All right?

MR. BARBER: For the plaintiffs, it's Timothy N. Barber and Cindy Jo Kiblinger and Kenneth McClain for the plaintiffs.

THE COURT: All right. Okay, got that.

MR. GADDES: It's Andrew Gaddes and Bruce Clark and Pamela Campbell for Philip Morris.

MR. FURR: We have Jeff Furr, Tom Schroeder, and Henry Jernigan for Brown & Williamson and R.J. Reynolds.

MR. MUSGRAVE: John Musgrave for Lorillard, and Mr. Farrell, local counsel.

THE COURT: All right. Joseph Farrell, right?

MR. FARRELL: Yes, Your Honor.

MR. TROY: Mark Troy for the Liggett defendants.

THE COURT: Right. Anybody else? Good. All right.

Let me just address one matter rather quickly. I don't know if the plaintiffs received the letter dated August 16th from Pam in which she enclosed an order which modified the case-management plan. It's Revision No. 24, and it has, basically—it structures where we're going from here on.

Did the plaintiffs receive that?

MR. McCLAIN: Yes, and I think we responded.

THE COURT: Is there any objection to the order?

MR. McCLAIN: Yes, we had some suggested change in dates as I understand it. I've been out, Judge, but didn't we have some changes in the dates that we were asking for?

MR. BARBER: In addition to the structural things, we have some other objections, Judge. As an example—this is an example now—of requesting us to send everything FedEx and fax for everything to everybody, and the filing times of 3:30 p.m.

But that's just an example of the—we just want to reserve rather than have you precipitously enter an order changing the thing, we want to have you be able to review our objections to it. And then whatever you want to do is fine, but we do have some objections to it, substantive objections.

THE COURT: And you say you have sent that to me?

MR. BARBER: No.

THE COURT: You're going to?

MR. BARBER: We just got the thing.

THE COURT: All right, all right; so you'll have it in next week?

MR. BARBER: Next week, certainly by sometime next week. Whatever time you tell us we have to have it, we'll have it in there.

THE COURT: Have it in by Friday if you can, please.

MR. BARBER: Okay. That will be fine, Judge. Thank you.

THE COURT: All right. That's one thing. And now, the- this matter is set for consideration of a

motion requesting this Court to set forth findings of fact and conclusions of law, specifically, I presume, relating to the case-management plan, so that it could serve as a basis to seek extraordinary relief in the West Virginia Supreme Court.

MR. FURR: Yes, Your Honor.

THE COURT: Now, who's going to speak?

MR. FURR: This is Jeff Furr, Your Honor, on behalf of the defendants. As the Court has recognized, we have decided again to seek review of the trial plan by writ, and perhaps out of an abundance of caution, but our interpretation of the Allstate v. Gaughan case is that it may be incumbent on us to request the Court to make findings of fact and conclusions of law and reduce that to writing in order for the Supreme Court to be properly able to consider our writ.

THE COURT: Okay.

MR. BARBER: Judge, this is Tim Barber, as you well know, the rules require a final judgment to make findings of fact and conclusions of law under 54(b). That's really not required in this thing; however, we do have a transcript of the hearing that you had in May, in which you articulate at length why you're doing all this.

And that's part of the transcript, and these guys, if they want to go up on a writ, you've made it clear what your findings—in that transcript. It's not a real question about it, and for them—I think they've come up with some kind of a thing about that you—something that's self—a bootstrap operation for them to be able to go to the Supreme Court.

If you want to take your transcript and you want to articulate your findings of fact that are different in some respects from the—from that in which that you already have articulated, then that's fine. But we believe that you—it's a matter of record; it's in the transcript.

Frankly, Judge, in the past, Pamela Campbell, who's on this phone message with us, has always supposedly authored these orders. And, of course, in this case they lost, so she apparently decided not to enter an order reflecting that. Nevertheless, it is a matter of record that they can go to the Supreme Court, as you very well know, and say this is the ruling of the judge.

Now, if you want to change it in some fashion, then you—we'll be glad to provide you with a copy of the transcript of your findings, and that's it. We are not—to have an appetite to convenience Mr. Furr or these defendants for going again, over and over again. And this again is going to be an effort to try to delay this thing again from the March date, which we oppose.

But I've said all I'm going to. Ken McClain is on here with me. We have—if he wants to add something to what I just said, that's fine.

MR. McCLAIN: No, Judge, I don't.

THE COURT: All right.

MR. FURR: Jeff Furr. I looked very closely. Frankly, I have no idea what the response to the argument really is, but, nonetheless, I indicated that we were doing this out of an abundance of caution.

I think that one thing that no one should want, including the plaintiffs, is for the Supreme Court to

decline to accept our writ because it was under the—because it concluded that it did not know enough about the trial plan yet in order to review it properly.

But under Gaughan we made this motion; we think that further articulation of the Court's views of the—its intentions with respect to the trial plan might well be of assistance to the Supreme Court. As to why the last order has not been entered yet, I'd have to defer to Pam and let her explain to you what the delay has been.

THE COURT: Well, let me just respond. I've given this a lot of thought, and I've gone back and I have—all the way back and reread my memorandum of opinion and order that grew out of the Allstate case.

And then, of course, that basically served as a basis for the certified question that went to the Supreme Court, and I reread their opinion and the various other ancillary opinions.

And I then looked at the—as to whether or not the Philip Morris versus Williams case may have—requires additional findings of fact.

I think, and I believe that I've already made them. And the trial plan—and what I'm basically doing is taking the lead from the opinion of Justice Maynard, and I don't believe that the Williams case changes that. And I said that, and I'm not going to change my views on that.

And the trial plan as approved so far by the West Virginia Supreme Court by their opinion, which was filed December 2, 2005, is still continuing, and I don't think anything more is needed.

I do think the record and the reason—when I laid all these various reasons as to why the trial plan is going to continue, it was really in—I had in mind those being the findings of fact and conclusions of law.

So you can take those—and I think the Gaughan case, basically, and I understand why you're concerned about it. But I think it satisfies any requirement the Supreme Court might have regarding this issue.

So I'm just going to stand on what I have already said.

MR. FURR: Thank you. You understand I said we were doing this out of abundance of caution.

THE COURT: I appreciate that, I do; that's fine. As far as I'm concerned, all I want to do now—you obviously can do what you feel you have to do to protect your clients' interests. That's fine. As far as I'm concerned right now, I'm just trying to get ready for the March trial date. So until—

MR. BARBER: Judge, not to interrupt, but—this is Tim Barber—because—that, apparently, we prevailed in this thing, I'm going to go ahead and draft the order myself.

And so could we just simply say that the motion is denied based upon the fact that you have already articulated in your previous ruling of your—the reasons behind your findings, but—your decision. Would that be—

THE COURT: The reasons being . . .

MR. BARBER: Brief, very, very brief order?

THE COURT: The reason behind my decision to continue with the original trial plan as formulated and as, I believe, endorsed by the opinion filed December 2, 2005, and the subsequent findings of fact, conclusions of law that I made just ratifying that, yes, that's it.

MR. BARBER: Thank you, Judge.

THE COURT: Thank you all very much.

UNIDENTIFIED SPEAKER: Thank you.

* * *

(This hearing was concluded at 4:50 p.m.)

* * *

APPENDIX D
[Order of the Circuit Court for Ohio County, West Virginia (August 28, 2007)]

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

IN RE: TOBACCO LITIGATION

(Individual Personal Injury cases) Civil Action No. 00-C-5000

(Judge Arthur M. Recht)

ORDER

At a hearing on May 23, 2007 set by agreement, respective counsel addressed the issues raised in Defendants' Motion to Vacate the Trial Plan in Light of Williams and the responses filed attendant thereto.

Upon the submissions and argument thereon, the court announced a denial of the motion and articulated the grounds therefor.

Accordingly, it is hereby ORDERED:

(1) Defendants' Motion to Vacate the Trial Plan in Light of Williams is denied for the reasons assigned.

(2) A copy of the transcript of the hearing held May 23, 2007 is attached and made a part of this Order as a reflection of the court's holding.

Defendants' objections and exceptions are preserved.

Entered this 28th day of August, 2007.

s/ Hon. Arthur M. Recht

Judge Arthur M. Recht

Presented by:

s/ Timothy N. Barber by ctk

Timothy N. Barber (WVSB #231)
Post Office Box 11746
Charleston, WV 25339
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Counsel for Plaintiffs

APPENDIX E
[Transcript of Hearing May 23, 2007 In the Circuit Court of Ohio County, West Virginia]

IN THE CIRCUIT COURT OF OHIO COUNTY

STATE OF WEST VIRGINIA

IN RE: TOBACCO LITIGATION:

CASE NO. 00-C-5000

PERSONAL INJURY CASES:

* * *

MOTION TO VACATE TRIAL PLAN

* * *

Before: HON. ARTHUR M. RECHT

May 23, 2007

11:15 a.m.

* * *

Whereupon the above entitled matter came on for hearing at the Ohio County Courthouse, Wheeling, West Virginia, and the proceedings were as follows:

* * *

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* * *

PROCEEDINGS

* * *

THE COURT: Okay, Be seated, please. Good afternoon, everybody.

MR. FURR: Good afternoon, Your Honor.

THE COURT: All right. We got some matters to address here today, I guess. I don't know the order that you want to take them in.

I guess probably something that we should address and dispose of as expeditiously as possible is the defendants' motion to vacate the trial plan in light of the recent United States Supreme Court case of Philip Morris versus Williams.

Were you stretching or did you—

* * *

(Laughter.)

* * *

MR. GADDES: Sorry, Your Honor, I was getting ready to talk, but looks like Your Honor might have something else to say first.

THE COURT: I have read it all, read everybody's papers. And I always like to hear good argument, but as I—this is now the second time that we're back looking at the validity, I guess, of the original case-management plan. The first was in light of the Campbell case, and now in light of the Williams case. And do either of those cases do anything to recommend an alteration to the case-management plan?

As you all know, we're not going to rehash Campbell. The West Virginia Supreme Court has spoken on that, and that's the final word.

The question now is: What has Williams added or subtracted at all to what the West Virginia Supreme Court has said in terms of validating the case-management plan?

If you—this is how I look at Williams as it relates to the case-management plan. And I believe the core holding—anytime the United States Supreme Court gets involved in discussing punitive damages, there's a hell of a lot more heat than light on where we're going. You end up just eating your own tail as to really what they're trying to say.

But I think what, in this case, Justice Breyer was saying that—he says:

The question we addressed today concerns a large state court punitive damage award, and we're asked whether the constitution's due-process clause permits a jury to base that award in part upon its desire to punish the defendant for harming persons who are not before the Court, for example, victims whom the parties do not represent, and we hold that such an award would amount to taking the property from the defendant without due process.

I guess, basically, the core of what they were trying to say—they use a lot of words to say that, but I think that's basically what they were saying, and I believe that, in this case, that we simply do not have parties who are not before the Court.

Everybody, every plaintiff in this case, is a party in the whole scheme of things, both in terms of Phase I and Phase II. There are a group of plaintiffs; there are no non-parties in this case.

At some point in Phase II you're going to get down to specifics relating to individual plaintiffs on issues of causation and other individual issues that have to be decided, and how they may have been harmed by a particular product, and to the extent would the multiplier, if in fact there is a multiplier,

apply to any compensatory award. But that's in Phase II.

Phase I, which would be tried basically when you try the product defect, and, as we said way back—and the case of Alkire versus First National Bank of Parsons probably does more to assist in formulating how a punitive-damage claim should be tried, I think, than every court in the United States. Just so happens in this case it applies to West Virginia because it sets out—it doesn't get too confused.

You see, the problem—what many times happens, I think, in punitive damage is, you start to overlap when you get into the issues of the size of the award, the ratios, reprehensibility, and that becomes mixed into the whole question of whether or not you're even entitled to punitive damages.

Everything gets—it's one big stew, and what we try to do in West Virginia is to make it a little easier. And that was—what we said in Alkire is: Okay, forget about TXO and forgot about Garnes initially; just put that aside; don't jump to that yet. Let's first off, obviously, determine if there's liability and, then, determine under the standard of Mayer versus Frobe, the standard which we still use in these kind of cases.

There are some other punitive damage cases that use another standard, but that's not involved here. There's an actual malice standard in some insurance cases which doesn't apply here.

But you then put on your evidence and—as we'll do in this case—and the conduct of all the defendants as it relates to Mayer versus Frobe once we get into the—into that phase of the case.

And the jury will be asked initially—well, even before we get there, there will be a determination made, as a matter of law, as to whether or not that question should even go to the jury: Is there enough evidence presented that would carry to the jury whether or not the standard of Mayer versus Frobe have been violated? Let's say: Yes, there has been. So the jury gets the question.

Initially, when you—on your first part of the case here, you'll be arguing product defect and conduct. That's all at that point. And the jury comes back, and let's assume the product is defective by whatever standard we use, they come back and say: Yes. All the defendants have acted improperly insofar as all the plaintiffs are concerned in this case. They won't know them, of course; we know them. But their conduct is such that, once a plaintiff shows that they smoked that particular product, then they would be the beneficiary of whatever punitive damage award would be awarded.

Now you get, now you get down—it's over; that part's over. You tell the jury: Go home, come back the next day. Next day you come back, and now you try all the issues of reprehensibility, of—well, of TXO and Garnes and all the standards that are contained in those cases.

That's where you get to the relationship between the harm, and you get to the question of repre—reprehensibility seems to be on everybody's mind in Williams. You get to that as it relates to the plaintiffs in this case.

There are no nonparties. I guess that's a terrible —probably bad English, but that's why I don't think Williams even—as, a matter of fact, I quite frankly

thought, and I said it—I thought Campbell was a case that may have impacted more on this plan than did the Williams case, and it didn't, well, according to the West Virginia Supreme Court.

So I'm not going to change the trial plan. As a matter of fact, if—and maybe it was the mood that I was in this past weekend when I looked at this thing. I feel stronger than ever that it is—that it is a proper plan.

It's going to take a lot of work; it's not easy. We're going to have to be very, very skillful in how we—in one of your papers, you said: Doesn't make any difference about the interrogatories.

I think the verdict form here and how we approach the jury is going to be very important. We can't ignore that. But I think that's—that's how this case can proceed on without in any way—now, maybe the United States Supreme Court will get another case and maybe come out, and things will be a little different. Hopefully, this case will be tried at least at this level before then.

So for those reasons, the motion to vacate the trial plan will be denied, and the objection of the—all the defendants will be saved to that ruling. All right.

I don't know what else we have. We have now—there's a motion—is this set for today, the motion to dismiss the 58 plaintiffs?

MR. HALL: The agenda letter we got, Your Honor, only had the motion to vacate the trial plan.

THE COURT: What else are we hearing today?
MR. LONG: Nothing, that was all that was on the agenda letter.

THE COURT: That's all?

MR. LONG: Yeah.

THE COURT: That's all we came for?

MR. LONG: That's it.

THE COURT: You drove all this way? Well, I shouldn't say that. You mean, I spent all this time. Is that all we're doing today?

MR. McCLAIN: As far as we know.

THE COURT: Is that all we're going to today?

MR. GADDES: Uh-huh.

THE COURT: When are we doing this other stuff?

MR. McCLAIN: Later.

THE COURT: Okay. Well, everybody. Now, you know—let's now get—we know we have a trial date set. Now, gentlemen, ladies, whatever you want to do, you do.

MR. FURR: We understand.

THE COURT: You've never stood on ceremonies before. My skin is, in this case, is as a rhinoceros. You just do what you have to do. But right now we're still set for March 17th.

And you want me to give you another date for some of this other stuff. What do you want me to do? I got the whole afternoon. I got to go home and play with my dog.

MR. HALL: I think that's the big issue before the Court, honestly, Your Honor, and some of these other issues are fairly inconsequential. I don't see a real need to set up a hearing and come back here for another 20 minutes to deal with some of the—

THE COURT: No, as a matter of fact, some of this stuff, quite frankly, and we have before, if you want to deal with it by telephone, we can do it by telephone, I don't care.

MR. McCLAIN: We would prefer that if you would do that.

THE COURT: Doesn't make any difference to me. That's fine. Are things moving along on these—I gathered, in regard to these encumbered plaintiff thing—I don't understand what's going on, to tell you the truth.

But it's not set for today, then we better set it down fairly quickly. Get a time when everybody is all right here and then give Doreen a call and set it down. If you want to it by phone, be happy to do it by phone. All right.

Sorry to get you all out.

MR. McCLAIN: Thank you, Judge.

MR. HALL: Thank you, Your Honor.

* * *

(This hearing was concluded at 1:45 p.m.)

* * *

CERTIFICATE

* * *

I, Katherine L. Warren, Official Court Reporter for the State of West Virginia, do hereby certify that the foregoing is a true and accurate transcript of the proceedings as taken stenographically by me at the time and place aforementioned.

Katherine L. Warren, C.C.R.

Certified Court Reporter

APPENDIX F
[Opinion and Order of the Circuit Court of Ohio County, West Virginia (December 26, 2006)]

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

IN RE: TOBACCO LITIGATION

(INDIVIDUAL PERSONAL INJURY CASES)

Civil Action No. 00-C-5000

(JUDGE ARTHUR M. RECHT)

MEMORANDUM OF OPINION AND ORDER

(Scope of issues to be tried in Phases I and Ia of the Case Management Order)

The defendants appear to be vexed concerning the issues to be tried in phase I (the defect, if any, of each defendant's product) and Ia (each defendant's conduct). Hopefully, this opinion and order will remove any confusion about what will be tried in phase I.[1]

Phase I concentrates on each defendant's product in terms of whether it was defective and the conduct of each defendant to the extent that a punitive damage award is warranted against each defendant,

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[1] There are actually only two phases contemplated by the case management order. Phase I, which collectively includes each defendants product defect, if any, and each defendants conduct measured against the standards of *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895), Phase II, which includes individual plaintiff issues of causation, extent of injuries and damages. Throughout the remainder of this opinion references will be made only to Phase I and its broadest sense and, if necessary, Phase II, as opposed to phases I and Ia.

and if so, what the punitive damage award should be expressed in terms of a punitive damage multiplier.

The perspective of Phase I is each defendant's product and each defendant's conduct. Testimony will concentrate on each defendant's product vis-a-vis product defect with appropriately formulated interrogatories dedicated to each defendant.

Phase I testimony will also concentrate on each defendant's conduct within the framework of *Mayer* v. *Frobe*, supra.

At the close of the case a determination will be made as to whether, as a matter of law, the jury should determine if any of the defendants' conduct justifies a punitive damage award: If that determination is in the affirmative to any or all defendants, the jury will be given appropriate formulated interrogatories directed to that defendant whose conduct as a matter of law warranted further jury consideration.

In the event the jury finds that any defendants' conduct warrants a punitive damage award, then further testimony will be presented to the jury within the paradigms contained in: *Garnes* v. *Flemming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991); *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 187 W.Va. 457, 419 S.E. 2d 870 (1992); and *Campbell* v. *State Farm*, 530 U.S. 408, 123 S.Ct. 1134, 155 L.Ed.2d 585 (2003), to determine the amount of the punitive damage award, again expressed within an appropriately formulated interrogatory. See, *Alkire* v. *First National Bank of Parsons*, 197 W.Va. 22, 475 S.E.2d 122 (1996).

It is so ORDERED.

A copy of this Memorandum of Opinion and Order has been mailed this date to liaison counsel for the plaintiffs, Cindy Kiblinger, Esquire, James F. Humphries and Associates, United Center, 505 Virginia Street East, Suite 800, Charleston, WV 25301; and liaison counsel for the defendants, Pamela Kandzari Campbell, Esquire, Allen Guthrie McHugh and Thomas, P.O. Box 3394, Charleston, WV 25301.

ENTER this 26th day of December, 2006.

s/ ARTHUR M. RECHT, JUDGE

APPENDIX G
[Opinion of the Supreme Court of Appeals of West Virginia (December 2, 2005)]

Supreme Court of Appeals of West Virginia.

In re TOBACCO LITIGATION

(Personal Injury Cases)

No. 32552.

Submitted: Sept. 20, 2005.

Filed: Dec. 2, 2005.

Syllabus by the Court

The United States Supreme Court's decision in *State Farm* v. *Campbell*, 538 U.S. 408 (2003), does not preclude the bifurcation of a trial into two phases wherein certain elements of liability and a punitive damages multiplier are determined in the first phase and compensatory damages and punitive damages, based on the punitive damages multiplier, are determined for each individual plaintiff in the second phase.

Justice MAYNARD delivered the Opinion of the Court.

Justice STARCHER concurs and reserves the right to file a concurring opinion.

Justice BENJAMIN concurs and reserves the right to file a concurring opinion.

MAYNARD, Justice.

This case concerns the following certified question from the Circuit Court of Ohio County:

Does the Due Process Clause of the Fourteenth Amendment to the Federal Constitution, as interpreted by *State Farm* v. *Campbell*, preclude a bifurcated trial plan in a consolidated action consisting of personal injury claims of approximately 1,000 individual smokers, wherein Phase I of the trial would decide certain elements of liability and a punitive damages multiplier and Phase II of the trial would decide for each plaintiff compensatory damages and punitive damages based upon the punitive damages multiplier determined in Phase I?

For the reasons that follow, we answer the certified question in the negative.

I.

FACTS

On September 28, 1999, then Chief Justice Larry Starcher entered an administrative order, pursuant to Rule 26 of the West Virginia Trial Court Rules for Trial Courts of Record, consolidating and transferring all similar tobacco litigation pending at that time to the Circuit Court of Ohio County with Judge Arthur M. Recht, a member of the Mass Litigation Panel, presiding. According to the parties, the litigation now includes approximately 1,100 individual plaintiffs' claims.

On January 11, 2000, the circuit court entered a "Case Management Order/Trial Plan"[2] that ordered

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[2] This Court has recognized that trial courts have significant leeway in implementing a mass trial format. *State ex rel. Mobil Corp.* v. *Gaughan*, 563 S.E.2d 419 (2002), *cert denied*, Mobil Corp. v. Adkins, 537 U.S. 944 (2002). In Syllabus Point 3 of

the consolidation of all pending personal injury tobacco cases in a single consolidated trial, with the trial issues to be bifurcated as follows:

(a) Phase I-General liability issues common to all defendants including, if appropriate, defective product theory; negligence theory; warranty theory; and any other theories supported by pretrial development.

Also to be tried in Phase I will be entitlement to punitive damages[.]

(b) Phase II-Individual claims of the plaintiffs whose cases have been consolidated. Either separate individual juries, judge or judges will independently address issues unique to each plaintiff's compensatory damages and any other individual issues in reasonably sized trial groups or on an individual basis.

The defendant tobacco companies ultimately moved to revise this trial plan by removing the issue of the entitlement to and, if appropriate, the amount of punitive damages from the jury's consideration in Phase I of the trial based on the U.S. Supreme Court case of *State Farm* v. *Campbell*, 538 U.S. 408 (2003). By order of June 16, 2004, the circuit court vacated and set aside the January 11, 2000, trial plan order. The circuit court found that *Campbell* stands for the principle that the conduct of a party against whom

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State ex rel. Appalachian Power Co. v. *MacQueen*, 479 S.E.2d 300 (1996), we held:

A creative, innovative trial management plan developed by a trial court which is designed to achieve an orderly, reasonably swift and efficient disposition of mass liability cases will be approved so long as the plan does not trespass upon the procedural due process rights of the parties.

punitive damages are sought must have a direct nexus to a specific person who claims to have been damaged by that conduct. The circuit court further found that "[t]he emphasis upon a subjective analysis of the defendant's conduct vis-a-vis a specific plaintiff requires that the defendant's conduct be tailored to each plaintiff[,]" and concluded that this could not be accomplished under the existing trial plan order. The circuit court certified the question set forth above to this Court in a September 24, 2004, order and answered the question in the affirmative.

II.

STANDARD OF REVIEW

"The appellate standard of review of questions of law answered and certified by a circuit court is de novo." Syllabus Point 1, *Gallapoo* v. *Wal-Mart Stores, Inc.*, 475 S.E.2d 172 (1996).

III.

DISCUSSION

The issue before is whether the United States Supreme Court's decision in *State Farm* v. *Campbell*, 538 U.S. 408 (2003) precludes bifurcation as originally ordered by the circuit court wherein the punitive damages multiplier would be determined prior to the assessment of compensatory damages for each plaintiff.

The plaintiffs below support the circuit court's vacated trial plan. They assert that the plan did not violate *Campbell*, which, they allege, is not a

fundamental change of long-standing punitive damages law but rather is perfectly consistent with such law. The defendant tobacco companies, on the other hand, challenge the circuit court's trial plan essentially on the basis that it violates *Campbell* by permitting the plaintiffs to show the reprehensibility of the defendants' conduct,[3] for the purpose of proving the appropriateness of punitive damages, by admitting evidence of conduct that was dissimilar to the conduct that injured particular plaintiffs. The defendants assert that evidence of prior bad conduct must be related to the defendant's actions toward individual plaintiffs in order to be relevant to the punitive damages analysis.

In *Campbell*, the insureds brought an action against their insurer, State Farm, to recover for bad-faith failure to settle within the policy limits and damages for fraud and intentional infliction of emotional distress. A jury awarded the insureds $2.6 million in compensatory damages and $145 million in punitive damages, which the trial court reduced to $1 million and $25 million respectively. On appeal, the Utah Supreme Court reinstated the $145 million punitive damages award. The United States Supreme Court subsequently reversed the punitive damages award because it found it to be "neither reasonable nor proportionate to the wrong committed," and "an irrational and arbitrary

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[3] In *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897 (1991), this Court held that the jury may consider the reprehensibility of the defendant's conduct including whether and how often the defendant engaged in similar conduct in the past. We believe that Campbell does not materially alter this holding. Rather, Campbell generally addresses the requirement that evidence of prior bad conduct must be "similar."

deprivation of the property of the defendant" in violation of the Fourteenth Amendment. *Campbell*, 538 U.S. at 429. The Court explained that the insureds' attempt to show the reprehensible conduct of State Farm by introducing evidence of State Farm's business practices for over 20 years in numerous states was constitutionally improper. According to the Court:

> The [insureds] have identified scant evidence of repeated misconduct of the sort that injured them. Nor does our review of the Utah courts' decisions convince us that State Farm was only punished for its actions toward the [insureds]. Although evidence of other acts need not be identical to have relevance in the calculation of punitive damages, the Utah court erred here because evidence pertaining to claims that had nothing to do with a third-party lawsuit was introduced at length. Other evidence concerning reprehensibility was even more tangential. For example, the Utah Supreme Court criticized State Farm's investigation into the personal life of one of its employees and, in a broader approach, the manner in which State Farm's policies corrupted its employees. The [insureds'] attempt to justify the courts' reliance upon this unrelated testimony on the theory that each dollar of profit made by underpaying a third-party claimant is the same as a dollar made by underpaying a first-party one. For the reasons already stated, this argument is unconvincing. The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished

> for any malfeasance, which in this case extended for a 20-year period. In this case, because the [insureds] have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis.

538 U.S. at 423-24 (citations omitted).

After carefully considering the parties' arguments and the Supreme Court's decision in *Campbell*, this Court finds that *Campbell*, which did not involve mass tort litigation, does not per se preclude the circuit court's original trial plan. We emphasize that the question before this Court is a narrow one. Accordingly, our answer is strictly limited to this narrow question. Our response is limited to the issue of whether *State Farm v. Campbell* precludes a bifurcated trial plan like the one below. Further, we do not address whether there may be other legal reasons to question the circuit court's bifurcated trial plan. Nor do we, or indeed can we, address in the abstract the specific evidence that may be presented on the issue of reprehensibility. Our conclusion in this case simply is, first, we find nothing in *Campbell* that mandates a reexamination of our existing system of mass tort litigation. Second, we find nothing in *Campbell* that per se precludes a bifurcated trial plan in which a punitive damages multiplier is established prior to the determination of individual compensatory damages. Beyond this, we leave more specific issues for another day. As this Court stated in *State ex rel. Mobil Corp.* v. *Gaughan*, 563 S.E.2d 419 (2002),

> we cannot substantively address Mobil's concerns regarding the potential use of a

> matrix, or a punitive damage multiplier, because the trial court has not yet definitively ruled upon the use of either of these mechanisms. Accordingly, any consideration of these issues at this time would be clearly premature. The trial court's announcement to postpone for the time being, any decision regarding the potential use of a matrix underscores the precipitous nature of ruling on this issue at this juncture. Matters such as a matrix and the use of a punitive damage multiplier, given the unresolved nature of the use of such mechanisms, can be better addressed by this Court upon appeals taken from final orders.

Gaughan, 563 S.E.2d at 426. Similarly, in the instant case, any issue beyond that set forth in the certified question is one that this Court will only consider on appeal with the benefit of a fully developed record and a final order. To reiterate, it is clear to this Court that *Campbell* does not eliminate mass tort litigation as provided for in our Trial Court Rule 26. Further, it is significant to us that bifurcated trial plans structured like the one at issue are common in West Virginia as well as other jurisdictions. In sum, absent a clear indication to the contrary, we believe that *Campbell* does not preclude the bifurcated trial plan at issue.

The circuit court found in its order setting aside its original trial plan, and the defendants agree, that "the conduct of a party against whom punitive damages are sought must have a direct nexus to a specific person who claims to have been damaged by that conduct." Further, "[t]he emphasis upon a subjective analysis of the defendant's conduct vis-a-

vis a specific plaintiff requires that the defendant's conduct be tailored to each plaintiff. That cannot be accomplished under the existing Case Management Order." We reject the circuit court's application of *Campbell*.

Campbell stands for the principle, among others, that "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." 538 U.S. at 422-23. Notably, the facts in *Campbell* were quite extreme. As noted above, the plaintiffs in *Campbell* brought what the Supreme Court characterized as a third-party bad faith claim against their insurer. In order to show the reprehensibility of the insurer's conduct, the plaintiffs were permitted to introduce evidence of insurer misconduct that had nothing to do with the type of misconduct that injured them. "For example, the Utah Supreme Court [in upholding the verdict in *Campbell*] criticized State Farm's investigation into the personal life of one of its employees and, in a broader approach, the manner in which State Farm's policies corrupted its employees." *Campbell*, 538 U.S. at 424.

In application of this principle to the instant case, it is the role of the circuit court to ensure that the plaintiffs' evidence is relevant, reasonably related to the acts upon which liability is premised, and supports their claim for punitive damages. Therefore, we find nothing in the circuit court's original trial plan that prevents the admission of evidence that is proper under *Campbell*.

Another concern raised by the defendants is that the circuit court's original trial plan would not ensure that punitive damages are proportionate to the injury caused to individual plaintiffs. Again, we disagree. As noted above, the circuit court's original trial plan anticipates that the defendants' general liability and a punitive damages multiplier would be determined in the first trial phase. In the second phase, compensatory damages would be determined for each individual plaintiff after individual evidence is presented. Finally, the punitive damages multiplier determined in the first phase would be applied to each plaintiff's compensatory damages award in order to reach the proper amount of punitive damages for each plaintiff.

Concerning the proper ratio of punitive damages to compensatory damages, the Court in *Campbell* opined,

> we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Pacific Mut. Life Ins. Co. v.] Haslip*, [499 U.S. 1 (1991)] in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.

> We cited that 4-to-1 ratio again in [*BMW of North America, Inc. v.] Gore*, [517 U.S. 559 (1996)]. The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing that sanctions of double, treble, or quadruple damages to deter and punish. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goal of deterrence and retribution, than awards with ratios in range of 500 to 1, or, in this case, 145 to 1.

Campbell, 538 U.S. at 424-425 (citations omitted). The defendants below contend that by determining the punitive damages multiplier prior to determining individual compensatory damages, there is no way to ensure the proper ratio between the two. We disagree.

This Court has recognized the duty of trial courts to review punitive damage awards. See *Bowyer* v. *Hi-Lad, Inc.*, 609 S.E.2d 895, 910 (2004) (stating that "[i]f a jury awards punitive damages to a litigant, a circuit court must carefully review the jury's verdict"); *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897 (1991) (setting forth the factors for trial courts to consider when reviewing awards of punitive damages). In cases like the instant one, we are confident that once individual compensatory and punitive damages awards are determined, the trial court can review each of the awards to ensure that it

comports with the principles articulated in *Campbell* and other applicable cases.[4]

Therefore, we now hold that the United States Supreme Court's decision in *State Farm* v. *Campbell*, 538 U.S. 408 (2003), does not preclude the bifurcation of a trial into two phases wherein certain elements of liability and a punitive damages multiplier are determined in the first phase and compensatory damages and punitive damages, based on the punitive damages multiplier, are determined for each individual plaintiff in the second phase.

Again, in answering the question certified to us, we have determined merely that the trial court's original trial plan is not violative of *Campbell*. Beyond this, we make no judgment on whether the trial court's original plan is the best method for trying the instant tobacco litigation. Further, we decline to tell the circuit court how to proceed. This Court has recognized that,

> management of [mass tort] cases cannot be accomplished without granting the trial courts assigned to these matters significant flexibility and leeway with regard to their handling of these cases. A critical component of that required flexibility is the opportunity for the trial court to continually reassess and evaluate what is required to advance the needs and rights of the parties within the constraints of the judicial system. Out of this

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[4] Punitive damages awards should also be assessed by the trial court in light of this Court's holdings in *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 419 S.E.2d 870 (1992), *aff'd*, 509 U.S. 443 (1993), and *Garnes*, *supra*, and the holding of the United States Supreme Court in *BMW of North America, Inc.* v. *Gore*, *supra*.

> need to deal with "mass litigation" cases in non-traditional and often innovative ways, TCR 26.01 was drafted and adopted.

State ex rel. Mobil Corp. v. *Gaughan*, 563 S.E.2d 419, 424 (2002). Thus, absolutely nothing in this opinion should be read to limit a trial court's significant leeway in fashioning a trial plan appropriate to the specific circumstances of the mass tort case at issue.

IV.

CONCLUSION

For the reasons set forth above, we answer the certified question as follows:

Does the Due Process Clause of the Fourteenth Amendment to the Federal Constitution, as interpreted by *State Farm* v. *Campbell*, preclude a bifurcated trial plan in a consolidated action consisting of personal injury claims of approximately 1,000 individual smokers, wherein Phase I of the trial would decide certain elements of liability and a punitive damages multiplier and Phase II of the trial would decide for each plaintiff compensatory damages and punitive damages based upon the punitive damages multiplier determined in Phase I?

Answer: No.

Certified question answered.

STARCHER, J., concurring.

I write separately to explain the "mass litigation" system that underlies the majority's opinion, and to state why such a system is necessary. I also write to explain why the method chosen by the circuit court

to assess punitive damages in this case is constitutional under the federal and state due process clauses.

The instant case represents a trial judge struggling to do precisely what the Rules of Civil Procedure and the Trial Court Rules told him to do: to do whatever was necessary "to secure the just, speedy, and inexpensive determination of every action." W.Va.R.Civ.Pro. Rule 1 [1998]. The defendants, however, contend that a speedy and inexpensive resolution of the question regarding whether they should be subject to punitive damages, for allegedly knowingly marketing a defective product, is contrary to their due process rights under the state and federal Constitutions. The defendants assert that the trial court is constitutionally mandated to deny the plaintiffs a just, speedy and inexpensive resolution of their claims in order that the defendants' property rights may be fully protected.

The majority opinion properly rejects this ridiculous position. The defendants are certainly entitled to due process. But exactly what process is due is entirely dependent upon the trial judge's discretion, and the trial judge's duty to afford all parties due process.

In the current age, a single mistake by a product manufacturer can injure dozens, hundreds, or even thousands upon thousands of individuals. A few manufacturers take a callous, deliberate, and knowing approach and choose to ignore the injuries caused by their products, or conspire to conceal the problems with their products. Sometimes, the injuries caused by the product cover the nation and span many decades.

The classic example is asbestos. Asbestos is a rock, a wonderful, flexible, fibrous material that is mined from the ground and which gives strength and fire resistance to products. Unfortunately, asbestos is one of the most toxic substances known to the human body. When inhaled over a period of time, it can cause the lungs to form scar tissue that grows and fills the lungs decades after exposure to asbestos stops. Even when inhaled into the lungs in minute quantities, it can cause cancer.

Companies that used asbestos in their products first started learning about asbestos-related diseases in the 1910s and 1920s. But rather than warn the public not to breathe asbestos dust, or stop mixing asbestos into their products, the companies plowed ahead and concealed the dangers. It was not until the 1970s that the government finally took action to prevent the use of asbestos, and required companies to put warnings on their products that breathing asbestos dust was hazardous.

The plaintiffs who filed lawsuits for their asbestos-related injuries did not sue the defendants because the products contained asbestos. Instead, the lawsuits focused on the fact that the products did not bear labels warning the product's users of the dangers of inhaling asbestos fibers. In other words, these were "failure to warn" product defect cases. West Virginia, with its many chemical and power plants, has many thousands of citizens who were exposed to asbestos dust from the use of asbestos-containing products in the 1940s through the 1980s. As a result, many citizens have developed (or are even just now developing) lung diseases and cancers directly related to asbestos.

Plaintiffs filed lawsuits in counties across West Virginia. First there were a few cases in State court, then a few dozen, then hundreds, then thousands.[1] Circuit courts started to try the cases one at a time, but quickly abandoned that route; trying each case individually would have required hundreds of years. The same lawyers and the same witnesses were employed, using the same documents and evidentiary exhibits, on a full-time basis in counties throughout the State.[2] Every trial involved weeks of

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[1] See, *e.g.*, *State ex rel. H.K. Porter Co., Inc.* v. *White*, 386 S.E.2d 25, 28 (1989) ("There are presently 114 asbestos-related personal injury actions pending before the respondent Judge White in the Circuit Court of Pleasants County. Of more immediate concern to the petitioner in this case, however, are ten (10) consolidated cases set for trial on October 23, 1989."); *Cline* v. *White*, 393 S.E.2d 923, 927 n. 2 (1990) ("According to records kept by the administrative office of the Court, as of March 26, 1990, there were 1,605 asbestos claims pending in West Virginia.").

[2] For instance, in *State ex rel. H.K. Porter Co., Inc.* v. *White*, 386 S.E.2d 25 (1989), the Court related the following circumstances about one lawyer representing one defendant that manufactured asbestos-containing products:

> ... H.K. Porter Company, Inc. has been a named defendant in approximately fifteen hundred (1,500) asbestos-related personal injury lawsuits throughout West Virginia, as well as sixty thousand (60,000) similar lawsuits throughout the United States. Since 1981, H.K. Porter Company, Inc. has been represented by the Auburn, Maine, law firm of Skelton, Taintor and Abbott. Steven F. Wright has served as Skelton, Taintor and Abbott's lead counsel in asbestos litigation since 1985, and, as a result, he has appeared in numerous state and federal jurisdictions in the United States.
>
> In October, 1988, Mr. Wright was retained to represent H.K. Porter Company, Inc. on a regional basis and he became responsible for case disposition in Maine, New

testimony to try the same issues about the same defendants again and again and again. Virtually everything pertaining to the defendants remained the same. The only issues that changed concerned the plaintiffs, namely the existence and degree of each plaintiff's injury and damages, which defendants' products caused the injury, and the relative fault of each defendant for the plaintiff's damages.

This Court recognized that special procedures were required to address this judicial administrative nightmare, and the current "mass litigation" system grew into being.

Starting in the late 1980s, a handful of circuit judges-myself included-were specially trained in handling complex, "toxic tort" litigation. Using its constitutional administrative authority, the Court transferred asbestos cases from throughout the State to a handful of counties for these specially-trained circuit judges to resolve. Once the asbestos cases were before a single judge, the judge used the authority provided by Rule 42(a) of the Rules of Civil

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Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, Puerto Rico, the Virgin Islands, and West Virginia. The petitioners state that H.K. Porter Company, Inc. "relies upon Attorney Wright as the attorney to whom it has given ultimate responsibility for settlement or trial of asbestos cases in West Virginia consistent with its national policies and procedures for defending such cases.

386 S.E.2d at 27-28. The Court further noted that the attorney had appeared in 1,500 asbestos-related personal injury actions in West Virginia in twenty-four months, and that "Mr. Wright included a list of his appearances at six trials in West Virginia from 1987 to 1989 on behalf of the H.K. Porter Company, Inc." 386 S.E.2d at 28 n. 4.

Procedure [1998] to manage the case. Rule 42 provides, in part:

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay....

Initially, instead of trying cases individually, cases with a common theme were grouped together for trial. The plaintiffs' cases were first placed in groups of twenty or thirty for trial. Usually, the plaintiffs all worked for the same employer or at the same work site, around the same time periods, and were therefore usually injured by the same defendants' products.

But when the numbers of cases began to reach into the thousands, judges adjusted their approach. Several thousand cases were "massed" together into one proceeding, and through the use of Rule 42, the cases were broken down into various sub-proceedings with common issues of law or fact for separate trials.

In run-of-the-mill litigation this Court has indicated that bifurcation of a case into mini-trials is generally disfavored. As we stated in Syllabus Point 4 of *Sheetz, Inc.* v. *Bowles Rice McDavid Graff & Love, PLLC*, 547 S.E.2d 256 (2001):

> West Virginia jurisprudence favors the consideration, in a unitary trial, of all claims regarding liability and damages arising out of the same transaction, occurrence or nucleus of operative facts, and the joinder in

such trial of all parties who may be responsible for the relief that is sought in the litigation.

However, in mass litigation cases, we have given trial judges substantial leeway to craft the procedures necessary to avoid unnecessary costs or delay. Asbestos cases continued be litigated as thousands of individual personal-injury claims against dozens of asbestos-using manufacturers were filed. The process for managing this litigation continued to change gradually. For example, by using Rule 42(a), judges began to bifurcate the asbestos cases into two separate proceedings. The first proceeding involved questions of law and fact that were common as to the defendants; the second proceeding involved questions common to the plaintiffs.

In the first proceeding, often called the "liability phase," one jury would see evidence regarding common questions of law and fact pertaining to the defendants.[3] Experts would testify about the uses of asbestos, the diseases caused by asbestos, and would show the jury decades-old documents and discuss what the various defendants knew about the dangers of asbestos and when. The primary question for the

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[3] Actually, at times there was more than one jury. When the numbers of defendants in a single trial became unmanageable, the defendant manufacturers were divided into different courtrooms with different juries. The defendants were grouped with other defendants with similar characteristics (for instance, asbestos-using gasket makers or glove manufacturers). The juries were brought together into one courtroom to hear evidence common to all defendants-like scientific evidence about the types of injuries caused by asbestos-and separated to hear evidence unique to each defendant.

jury to consider was this: considering the state-of-the-art knowledge of manufacturing in the 1940s, 1950s, 1960s, or 1970s, did each defendant manufacture a product that was defective because it failed to come with an adequate warning about the dangers of inhaling asbestos fibers?

With this first phase of the proceeding, the plaintiffs and the defendants avoided thousands of days of courtroom work in individual trials. The same lawyers were not required to use the same witnesses to repeatedly retry the same questions. By trying those questions once for all the plaintiffs, Rule 42(a) permitted a court to avoid "unnecessary costs or delay"-for both plaintiffs and defendants.

A corollary question addressed by the jury in the first proceeding concerned punitive damages. If the defendant actually knew about the dangers of asbestos in the 1940s, 1950s, 1960s, or 1970s—and many did—then the jury was asked a second question: did the defendant callously, deliberately or greedily fail to warn the public of those dangers, and if so should the defendant be punished for its actions?

Many of the same witnesses and documents used to prove that the product was defective were also used to prove an entitlement to punitive damages. Both issues overlap and involve the actual knowledge of the defendant. If the defendant knew the product was inherently dangerous for its intended use, the product was defective. Likewise, if the defendant knew that the product was inherently dangerous for its intended use, and knew that the product was causing harm to individuals, and the defendant recklessly or deliberately kept marketing

the defective product—well, that's grounds for punitive damages.

Juries in the first proceeding could easily determine, yes or no, whether punitive damages should be assessed against a defendant. The problem in the first proceeding was with fixing the actual dollar amount of punitive damages. Since the first phase jury knew nothing of the degree of injury or specific financial circumstances of each of the thousands of plaintiffs, the jury could not knowledgeably determine what dollar amount of punitive damages would be fair for each plaintiff.

It is axiomatic that punitive damages must bear a "reasonable relationship" to the potential of harm caused by the defendant's actions. Syllabus Point 1, *Garnes* v. *Fleming Landfill, Inc.*, 413 S.E.2d 897 (1991). To meet this reasonable relationship requirement, we indicated in Syllabus Point 3 of *Garnes* that juries must be instructed using the following language:

> Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.

Judges dealing with asbestos cases determined that the mandate of *Garnes* could be met by letting the jury in the first phase assess a "punitive damage multiplier." The jury was asked to calculate a multiplier such that the final dollar amount of

punitive damages paid by the defendant would bear a reasonable relationship to the harm that was likely to occur from the defendant's conduct as well as the harm that actually occurred. The punitive damage multiplier would be used in the second phase to multiply the amount of the plaintiff's compensatory damages to actually determine the dollar amount of the defendant's punitive damage liability.

In the second phase proceeding, questions of law and fact common to the plaintiffs would be resolved. The plaintiffs' cases would be broken down-into groups by the plaintiff's asbestos-related disease or by the plaintiff's work place, or even individually-and juries would hear evidence unique to each plaintiff. For instance, medical experts would discuss whether or not the plaintiff had an injury, and whether that injury was caused by asbestos. Economic experts would discuss the plaintiff's loss. Other experts would present evidence concerning the particular asbestos products that caused the plaintiff's injuries.

The second, "individual issues" or "damage phase" trials would begin with a brief statement to the jury by the lawyers about what happened in the first, "liability phase" trial. The juries would be instructed by the judge that the defendant's product was defective; the jury would only be charged with sorting out whether the defendant's product caused the plaintiff's injury, and the amount of the plaintiff's compensatory damages.

After the trial was complete, the judge would take the punitive damages multiplier determined in the first trial, multiply the plaintiff's compensatory damages by that multiplier, and thereby know the dollar amount of the punitive damages due and owing to the plaintiff. Furthermore, the judge would

then conduct a post-trial review of the punitive damages award to ensure that the award was constitutionally fair and reasonably related to the harm that the defendant caused and could have caused to the plaintiff.[4]

By the mid-1990s, this Court recognized that other individual personal-injury actions with characteristics similar to asbestos were being filed. The Court therefore took steps to codify the procedures that evolved in the context of asbestos litigation.

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[4] As we stated in Syllabus Point 4 of Garnes:

When the trial court reviews an award of punitive damages, the court should, at a minimum, consider the factors given to the jury as well as the following additional factors:

(1) The costs of the litigation;

(2) Any criminal sanctions imposed on the defendant for his conduct;

(3) Any other civil actions against the same defendant, based on the same conduct; and

(4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury.

In 1999, the Court adopted Trial Court Rule 26.01, formalizing the "mass litigation" system. Rule 26.01 created a "Mass Litigation Panel" consisting of six judges, and empowered the Panel to resolve any "mass litigation" case that the Chief Justice of this Court referred to the panel.[5] Essentially, the judges on the Panel are the specially trained judges who are ready and willing to take on cases with common questions of law or fact where large numbers of individuals have potentially been harmed, physically or economically, as a result of a catastrophe or as a result of a defective product.

The trial judge in the instant case has been an active participant on the Panel, and has aggressively worked to resolve mass litigation cases. In the

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[5] Rule 26.01(c) defines "mass litigation" thusly:

"Mass litigation" shall be defined as two (2) or more civil actions pending in one or more circuit courts: (a) involving common questions of law or fact in mass accidents or single catastrophic events in which a number of people are injured; or (b) involving common questions of law or fact in "personal injury mass torts" allegedly incurred upon numerous claimants in connection with widely available or mass-marketed products and their manufacture, design, use, implantation, ingestion, or exposure; or (c) involving common questions of law or fact in "property damage mass torts" allegedly incurred upon numerous claimants in connection with claims for replacement or repair of allegedly defective products, including those in which claimants seek compensation for the failure of the product to perform as intended with resulting damage to the product itself or other property, with or without personal injury overtones; or (d) involving common questions of law or fact in "economic loss" cases incurred by numerous claimants asserting defect claims similar to those in property damage circumstances which are in the nature of consumer fraud or warranty actions on a grand scale including allegations of the existence of a defect without actual product failure or injury.

instant case, it appears that he adopted the two-phase trial model that was used by judges in asbestos cases.

The defendants, however, insist that the bifurcation of these cases is improper. The defendants argue that they are entitled, pursuant to the due process clauses of the State and federal *Constitutions*, to try the question of punitive damages one case at a time, so that the jury can assess each defendant's culpability to each plaintiff individually. The defendants insist that the only way punitive damages may be reasonably related to the potential harm caused to an individual plaintiff is by a jury hearing evidence about both a defendant's conduct and the actual or potential harm to the plaintiff at the same time. In sum, the defendants assert that punitive damages can never be assessed in a "mass" litigation under Rule 42(a), or for that matter in a class action under Rule 23.

The inherent flaw with the defendants' argument is the assumption that due process, particularly to protect property rights, is a concrete concept. Instead, what process is due under the due process clause is determined under a sliding scale, and changes with the facts of each case. "When due process applies, it must be determined what process is due and consideration of what procedures due process may require under a given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been impaired by government action." Syllabus Point 2, *Bone* v. *W.Va. Dept. of Corr.*, 255 S.E.2d 919 (1979). "(D)ue process is flexible and calls for such procedural protections as the particular situation

demands." *Morrissey* v. *Brewer*, 408 U.S. 471 (1972). Necessarily implicit in the above quote, which was also expressed in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), is the principle that due process issues must be decided on the facts of the particular case. Once it is determined that due process applies, the question to be answered is "What process is due?"

The courtroom process that is due someone who has a few parking tickets is different from the procedural protections due a shoplifter, and vastly different from the process to be accorded someone who is accused of murder. And the due process protections for someone accused of a single murder are going to be different from someone accused of being a mass murderer, like Herman Goering or Saddam Hussein. Likewise, the amount of process that is due in a criminal case, where personal liberty or life is at stake, is different from the process that is due in a civil case, where only property interests are at stake.

The defendants argue that *State Farm* v. *Campbell*, 538 U.S. 408 (2003), mandates that all evidence of punitive damages must be presented to the jury and heard in relation to the injury caused to each specific plaintiff. Ignoring the fact that *Campbell* involved one defendant who had caused harm to a husband and wife in one instance (and not dozens of defendants who caused harm to thousands of plaintiffs over several decades), the defendants argue that *Campbell* preempts West Virginia's system of mass litigation. The inevitable result of accepting the defendants' argument is that it creates a judicial administrative nightmare. The same lawyers would be working for years, probably decades, to present the same witnesses to testify

using the same documents in each separate plaintiff's case.

If the majority opinion had accepted this reasoning by the defendants, we would essentially be saying that the more people a defendant injures with its defective product, the less likely the defendant is ever going to have to pay compensatory or punitive damages to the people injured by the product. The defendant would therefore be accorded a right to thousands upon thousands of individual trials that would cause the legal system to grind to a halt. At the same time, we would be telling the individual plaintiffs that they have no rights to any process-because of administrative gridlock, the individual plaintiffs would *de facto* be denied their day in court. The majority opinion rightly rejected this position.

As the members of this Court have noted before, *State Farm* v. *Campbell* presented no new law in the field of punitive damages. The case was nothing more than a summary, a collation, of prior case law. See *Boyd* v. *Goffoli*, 608 S.E.2d 169 (2004) (Davis, J., concurring) and (Starcher, J., concurring); *Jackson* v. *State Farm Mut. Auto. Ins.*, 600 S.E.2d 346 (2004) (Davis, J., concurring) and (McGraw, J., concurring).

The due process protections mandated by *State Farm* v. *Campbell* and its predecessors are, as the majority opinion indicates, encompassed in the trial plan which the circuit court initially adopted. The first phase trial permits a jury to examine a defendant's relevant misconduct, and determine whether punitive damages should be assessed. If the jury believes that punitive damages are warranted, then the jury also determines a punitive damages multiplier that establishes a numerical relationship between the potential harm of a defendant's conduct

and each plaintiff's compensatory damages. In the second phase proceeding, the trial judge actually multiplies the plaintiff's actual compensatory damages by the multiplier and establishes a punitive damages dollar figure. The circuit judge is then obligated by *Garnes* to review the punitive damages award to assess its fairness under the circumstances.

Under this process, thousands of allegedly injured plaintiffs will be permitted their day in court. The defendants will be permitted, in one proceeding instead of thousands, to contest the plaintiffs' claim that the defendants should pay punitive damages. And, if the trial judge determines this is the best course to take, the plaintiffs and the defendants will have secured the just, speedy, and inexpensive determination of every action.

I therefore concur in the majority's decision.

BENJAMIN, J., concurring.

I write separately to emphasize not only what the Court's opinion does, but also what it does not do. This unanimous opinion answers a narrow question in a narrow manner. It does no more. It does no less.

I think it important to underscore the essence of the Court's opinion:

> After carefully considering the parties' arguments and the Supreme Court's decision in *Campbell*, this Court finds that *Campbell*, which did not involve mass tort litigation, does not per se preclude the circuit court's original trial plan. We emphasize that the question before this Court is a narrow one. Accordingly, our answer is strictly limited to

> this narrow question.[10] Our response is limited to the issue of whether *State Farm* v. *Campbell* precludes a bifurcated trial plan like the one below. Further, we do not address whether there may be other legal reasons to question the circuit court's bifurcated trial plan. Nor do we, or indeed can we, address in the abstract the specific evidence that may be presented on the issue of reprehensibility. Our conclusion in this case simply is, first, we find nothing in *Campbell* that mandates a reexamination of our existing system of mass tort litigation. Second, we find nothing in *Campbell* that per se precludes a bifurcated trial plan in which a punitive damages multiplier is established prior to the determination of individual compensatory damages. Beyond this, we leave more specific issues for another day....

In this passage, the Court emphasizes the narrowness with which it approached and answered the certified question. In addition to twice stating that *Campbell* does not "*per se* " (by or in itself) preclude the circuit court's original trial plan, the Court twice specifically restricts its answer to the

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[10] The certified question from the Circuit Court of Ohio County being:

Does the Due Process Clause of the Fourteenth Amendment to the Federal Constitution, as interpreted by *State Farm v. Campbell*, preclude a bifurcated trial plan in a consolidated action consisting of personal injury claims of approximately 1,000 individual smokers, wherein Phase I of the trial would decide certain elements of liability and a punitive damages multiplier and Phase II of the trial would decide for each plaintiff compensatory damages and punitive damages based upon the punitive damages multiplier determined in Phase I?

certified question, stating that we are "... not address[ing] whether there may be other legal reasons to question the circuit court's bifurcated trial plan" and "[n]or do we, or indeed can we, address in the abstract the specific evidence that may be presented on the issue of reprehensibility." These limitations merit attention.

Plaintiffs and defendants differ greatly herein on their views of the scope and commonality of the evidence of reprehensible conduct which may warrant consideration of punitive damages. Plaintiffs appear to contend that the evidence of reprehensible conduct is the same and applicable to all plaintiffs. In their amended brief, plaintiffs claim that all 1,000 of them "were harmed, not just by similar conduct, but by the exact same conduct-namely, defendants' fraudulent concealment of the known hazards of smoking." Thus, plaintiffs argue that this evidence is suitable for determining a single punitive damage multiplier for all of them. Since plaintiffs were all harmed by the same alleged conduct of defendants, plaintiffs contend that the trial court need not be concerned with similar and dissimilar conduct and that the jury, on the basis of this common reprehensible conduct, may apply one punitive damage multiplier to whatever compensatory damages may be subsequently awarded.

Defendants, on the other hand, contend that the evidence is diverse with no sameness applicable to all plaintiffs. Defendants therefore contend that such evidence is unsuitable for determining a single punitive damage multiplier fitting to all claimants. They claim in their response that plaintiffs have not limited their damages claim to recovery for

fraudulent concealment, but also that plaintiffs seek recovery "for negligence and strict liability in the design, manufacture, and warning labels of cigarettes; strict liability in selling an unreasonably dangerous product; negligence in testing and researching; and negligence in their advertising and in the sale of cigarettes to minors." Among other arguments, defendants contend that (1) evidence of concealment or failure to warn cannot be a basis of punitive damages for individual plaintiffs who were fully aware of the risks of smoking or of the facts supposedly concealed; (2) evidence relating to addiction cannot be a basis of punitive damages for individual plaintiffs who are not addicted; (3) evidence of misconduct in the 1950s or 1960s cannot be a basis of punitive damages for individual plaintiffs who didn't start smoking until the 1970s or 1980s; (4) evidence relating to light cigarettes cannot be a basis of punitive damages for smokers of unfiltered cigarettes; and (5) evidence relating to a particular defendant against whom a plaintiff is pursuing no claim should not be a basis for that individual plaintiff's punitive damages. Thus, defendants claim, a plaintiff could obtain (and some defendants could pay) punitive damages set by the application of a multiplier that was based on the misconduct of companies that those plaintiffs did not sue or on alleged reprehensible conduct of a defendant which is not even applicable to the specific plaintiff.

In responding to certified questions rather than in considering issues raised on properly perfected appeals, this Court necessarily lacks the intimate knowledge which the trial level circuit court has of all facets of the litigation below. We do not have a full and complete record before us in a consideration

of a certified question. We therefore cannot, and indeed should not, in my opinion, determine whether all plaintiffs were harmed by the exact same conduct, as the plaintiffs contend, or, if harmed at all, whether plaintiffs were harmed by diverse conducts of different defendants, the products of which all plaintiffs did not smoke, as the tobacco companies claim. Nor has the Court done so in its answer to the certified question. The Court's opinion does not discuss the divergent views of the parties with respect to the evidence of reprehensible conduct. Nor has the Court expressed a view on which conducts on the part of the defendants are similar and which are dissimilar. Without such factual determinations having first been made, daunting and complex as that process may ultimately prove to be, this Court is in no position, in my opinion, to say ultimately whether *Campbell*'s restricted view on evidence of reprehensibility, and the constitutional considerations which underlie such a view, would sanction a punitive damages multiplier as the circuit court's original two-phase trial plan envisioned. Judge Recht apparently thinks not, and I, for one, am in no position to disagree with him. Nor, as I read it, does the Court's opinion. In limiting its answer herein, the Court states that "[b]eyond [our limited response], we leave more specific issues for another day"; that "[m]atters such as a matrix and the use of a punitive damages multiplier, given the unresolved nature of the use of such mechanisms, can be better addressed by this Court upon appeals taken from final orders" quoting *State ex rel. Mobil Corp.* v. *Gaughan*, 563 S.E.2d 419, 426 (2002); and, most

importantly, that "we decline to tell the circuit court how to proceed".[11]

There is yet another significant sentence in the Court's opinion which I believe needs emphasis: "[W]e do not address whether there may be other legal reasons to question the circuit court's bifurcated trial plan." Although not recently, this Court has said on many occasions that:

> Punitive damages should not be awarded in any case where the amount of compensatory damages is adequate to punish the defendant; and, in a case where such compensatory damages are not adequate for the purpose of punishment, only such additional amount should be awarded as, taken together with the compensatory damages, will sufficiently punish the defendant.

Syl. *Hess* v. *Marinari*, 94 S.E. 968 (1918). *Accord*, *Mayer* v. *Frobe*, 22 S.E. 58, 63 (1895), *Fisher* v.

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[11] West Virginia is not alone in its concerns regarding the need for an efficient, yet procedurally proper, litigation of mass and complex civil cases. There may well be no "best" procedure for dealing with such cases in view of the differing nature of such cases. From my albeit limited research, I find that a number of jurisdictions have moved away from the type of trial plan originally proposed below, and I find no jurisdictions which have recently embraced such a plan. See, *e.g.*, *Liggett Group Inc.* v. *Engle*, 853 So.2d 434, 451-2 (Fla. Ct. App. 2003), *appeal granted*, 873 So.2d 1222 (Fla. 2004); *Philip Morris, Inc.* v. *Angeletti*, 752 A.2d 200, 249 (Md. 2000); *Southwestern Ref. Co.* v. *Bernal*, 22 S.W.3d 425 (Tex. 2000); *Smith* v. *Brown & Williamson Tobacco Corp.* 174 F.R.D. 90, 97 (W.D. Mo. 1997). Whether this points to the presence of a trend that such a type of trial plan is now generally disfavored in the United States is not currently before this Court.

Fisher, 108 S.E. 872, 874 (1921); and *Raines* v. *Faulkner*, 48 S.E.2d 393, 399 (1947).

The principle of *stare decisis* is a fundamental foundation of our system of jurisprudence. It is the source of the predictability, balance and stability in the legal system necessary to permit individuals and companies to structure their affairs and have confidence in the surety of their rights. It is, by any other consideration, a necessary aspect of the "fairness" which litigants should rightfully expect they will have in our courts and for which confidence in the judicial system will be advanced. The United States Supreme Court has spoken on the duty of courts to follow precedent on many occasions. In *Rodriguez de Quijas* v. *Shearson/American Exp.*, 490 U.S. 477, 484 (1989), the court admonished lower courts that "[i]f [its] precedent has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [the lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." I am not aware of any case of this Court which disturbs our holding in *Marinari*.

The lower court should, in my opinion, consider whether the principles repeated in *Marinari* and its progeny, as well as the constitutional principles and protections applicable herein, present "other legal reasons to question the circuit court's bifurcated trial plan." It could be that a jury given the opportunity to consider the assessment of punitive damages after having awarded compensatory damages may conclude that the magnitude of the compensatory damages awarded does not warrant the assessment of further damages to punish the defendants. Likewise, such a jury may conclude that the

magnitude of the compensatory damages when considered with the defendant's proven reprehensible conduct could require punitive damages in excess of what a uniform multiplier would otherwise provide.[12]

It is the circuit court's decision how to proceed. It is hoped that counsel for the parties will endeavor to provide the circuit court with such support, suggestions, and recommendations as the circuit court may request to best determine the proper trial plan to utilize in this litigation.

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[12] The Supreme Court in *Campbell* appears to have said as much when it stated that "[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, *after having paid compensatory damages*, is so reprehensible as to warrant the imposition of *further* sanctions to achieve punishment or deterrence." 538 U.S. at 419 (Emphasis added.) The quoted statement from *Campbell* is consistent with *Marinari* and its progeny.

APPENDIX H
[Opinion and Order of the Circuit Court of Ohio County, West Virginia (June 16, 2004)]

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

IN RE: TOBACCO LITIGATION

INDIVIDUAL PERSONAL INJURY CASES.

CIVIL ACTION NO. 00-C-5000

MEMORANDUM OF OPINION AND ORDER

PHASE I, CASE MANAGEMENT PLAN – PUNITIVE DAMAGE MULTIPLIER

Certain of the defendants[1] in the above captioned matter have moved to revise the initial Case Management Order/Trial Plan (herein Case Management Order) entered January 11, 2000, by removing the issue of the entitlement and, if appropriate, the amount of punitive damages from the jury's consideration in Phase I of the trial.

The defendants had initially objected to the consideration of punitive damages under the Case Management Order on a number of grounds relying in large part upon *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996).[2] The defendants' objection

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[1] Phillip Morris USA, Inc.; R.J. Reynolds Tobacco Company; Lorillard Tobacco Cmopany; Brown & Williamson Tobacco Corporation, individually and as successor by merger to the American Tobacco Company; British American Tobacco (Investments) Limited f/k/a British American Tobacco Company Limited; and B.A.T. Industries p.l.c.

[2] *BMW of North America, Inc. v. Gore*, Supra, 517 U.S. 559, 575, instructed trial courts in reviewing punitive damages to

was rejected because the concept of measuring the defendants' conduct so that the jury could consider whether any punitive damage multiplier was justified was determined to be the most efficient and expeditious manner of addressing the issues involved in the numerous individual personal injury cases, and yet satisfy the due process requirement formulated in *Pacific Mutual Life Insurance Company* v. *Haslip*, 499 U.S. 1 (1991); and *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993).[3] The defendants now ask this Court to revisit it's objection to the inclusion of punitive damages in Phase I relying upon the recent decision of the United States Supreme Court in *State Farm Mutual Automobile Insurance Company* v. *Campbell*, 538 U.S. 408 (2003).

This Court has read and reread *Campbell* in an effort to determine whether there is any conceivable manner to salvage the extant Case Management Order and still accommodate the due process demands of *Campbell* to require any punitive damage award to punish and deter conduct that has

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consider three guideposts: (1) the degree of reprehensibility of the defendant's; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

[3] The Case Management Plan was further determined to conform to Syllabus Point 3 of *State ex rel. Appalachian Power Co. v. MacQueen*, 198 W.Va. 1, 470 S.E.2d 300 (1996): "A creative, innovative trial management plan developed by a trial court which is designed to achieve an orderly, reasonably swift and efficient disposition of mass liability cases will be approved so long as the plan does not trespass upon the procedural due process rights to the parties."

a specific relationship to a specific injured party. It cannot be done.

The majority opinion in *Campbell* contains the recurring theme that the conduct of a party against whom punitive damages are sought must have a direct nexus to a specific person who claims to have been damaged by that conduct. For example:

> "In light of these concerns in *Gore*, Supra, 517 U.S. 559, we instructed Courts reviewing punitive damages to consider three guideposts: ... (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award...." *Campbell*, Supra, 538 U.S. 408, 418;
>
> "The Utah Supreme Court's opinion makes explicit that State Farm was being condemned for its nationwide policies rather than for the conduct direct towards the Campbells." *Campbell*, Supra, 538 U.S. 408, 420;
>
> "For a more fundamental reason, however, the Utah courts erred in relying upon this and other evidence: The court's award of punitive damages to punish and deter conduct that bore no relation to the Campbell's harm. A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to

adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, but we have no doubt the Utah Supreme Court did that here." *Campbell*, Supra, 538 U.S. 408, at 422, 423.

"The Campbells have identified scant evidence of repeated misconduct of the sort that injured them. Nor does our review of the Utah Court's decision convince us that State Farm was only punished for its actions toward the Campbells." *Campbell*, Supra, 538 U.S. 408, 423.

"In this case because the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is only conduct relevant to the reprehensibility analysis." *Campbell*, Supra, 538 U.S. 408, 424.

A copy of this Memorandum of Opinion and Order has been mailed this date to liaison counsel for the plaintiffs, Cindy Kiblinger, Esquire, James F. Humphries and Associates, United Center, 505 Virginia Street East, Suite 800, Charleston WV 25301; and liaison counsel for the defendants, Pamela Kandzari, Esquire, Allen Guthrie McHugh and Thomas, P.O. Box 3394, Charleston WV 25301.

Enter this 16th day of June, 2004

s/ARTHUR M. RECHT, JUDGE

APPENDIX I
[Case Management Order/Trial Plan of the Circuit Court of Ohio County, West Virginia (January 11, 2000)]

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

IN RE: TOBACCO LITIGATION

(INDIVIDUAL PERSONAL INJURY CASES)

CIVIL ACTION NO. 00-C-5000

(JUDGE ARTHUR M. RECHT

JUDGE TOD KAUFMAN)

CASE MANAGEMENT ORDER/TRIAL PLAN

1. All personal injury tobacco cases for plaintiffs now pending, filed in, or transferred to and accepted by this Court prior to August 15, 2000, shall be included in a single consolidated trial in Ohio County on June 4, 2001.

2. All pleadings shall be filed in the Circuit Court of Ohio County, West Virginia with the caption IN RE: TOBACCO LITIGATION (INDIVIDUAL PERSONAL INJURY CASES), Civil Action No. 00-C-5000 (Judge Arthur M. Recht and Judge Tod Kaufman).

3. The issues to be determined in the consolidated trial shall be bifurcated as follows:

(a) PHASE I – General liability issues common to all defendants including, if appropriate,

defective product theory; negligence theory; warranty theory; and any other theories supported by pretrial development.

Also to be tried in Phase I will be entitlement to punitive damages within the definition of Syllabus Point 4, *Mayer* v. *Probe*, 40 W.Va. 246, 225 S.E. 58 (1895); Syllabus Points 3 and 4, *Garnes* v. *Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991); Syllabus Point 15, *TXO Production Corp.* v. *Alliance Resources Corp.*, 287 W.Va. 457, 419 S.E.2d 570 (1982); and Syllabus Point 7, *Alkaire* v. *First National Bank of Parsons*, 187 W.Va. 122, 475 S.E.2d 122 (1996).

(b) PHASE II – Individual claims of the plaintiffs whose cases have been consolidated. Either separate individual juries, judge or judges will independently address issues unique to each plaintiff's compensatory damages and any other individual issues in reasonably sized trial groups or on an individual basis.

4. Liaison counsel will be Troy Hughes of James P. Humphries & Associates, Bank One Center, 707 Virginia Street, East, Suite 1113, Charleston, WV 25301 for the plaintiffs and Pamela Kandzari of Allen, Guthrie & McHugh, 1300 Bank One Center, Charleston, WV 25301 for the defendants. They will be responsible for transmitting all court orders and court filings to the appropriate defense counsel and plaintiffs' counsel.

5. The following shall be established and observed relative to discovery and other activity in this trial:

(a) February 9, 2000, at 1:30 p.m. – Pretrial hearing (review case management/trial plan and motions);

(b) March 1, 2000 – As for each plaintiff presently included in the consolidated trial, plaintiffs provide baseline medical and factual information (i.e. plaintiff's name, address, date of birth, social security number, brand of tobacco product used, the time frame such products were used, where the plaintiff purchased such products, the injury the plaintiff suffered as a result of tobacco use, the date the plaintiff discovered or was diagnosed with the injury, and the date and cause of decedent's death) and a list identifying each plaintiff to be included in the consolidated trial as to each defendant.

(c) March 15, 2000 – Plaintiff provide list of all lay witnesses and all expert liability and medical witnesses by individual defendant which are intended for use at trial. As to each lay witness, plaintiffs shall identify the defendants against whom he/she is expected to testify. Such witnesses shall not be permitted to testify at trial as to any defendants not designated for that witness. Further, defendant not designated for that witness are not required to attend any deposition of such witness and do not waive their right to redepose that witness. Plaintiffs must provide all expert reports on this date. If an expert has not produced a report, a Rul6 26(b)(4) interrogatory response shall be provided, which includes a summary of such experts opinion and expected testimony.

(d) April 15, 2000 – Defendants provide list of all lay witnesses, expert liability and medical witnesses. Defendants must provide all expert reports on this date. If an expert has not produced a

report, a Rule 26(b)(4) interrogatory response shall be provided, which includes a summary of said expert's opinion and expected testimony;

(e) May 1 – November 30, 2000 – Expert and lay witness depositions shall be conducted during this period;

DEPOSITIONS - All sworn deposition testimony from any previous or contemporary tobacco litigation cases may be used in pretrial motion and at trial;

DOCUMENTS – All documents produced or filed by defendant tobacco companies with the federal government including but not limited to Congress and the FDA, shall be produced and reasonably identified to a designated depository in West Virginia with a current privilege log;

(f) June 2, 2000 at 3:00 p.m. – Pretrial Hearing (status and motions);

(g) July 14, 2000 at 3:00 p.m. – Pretrial Hearing (status and motions);

(h) August 11, 2000 at 3:00 p.m. – Pretrial Hearing (status and motions);

(i) September 8, 2000 at 3:00 p.m. – Pretrial Hearing (status and motions);

(j) September 29, 2000 – Last day on which plaintiffs and defendants may serve requests for admissions, with responses to such requests being due within the time period contemplated by the West Virginia Rules of Civil Procedure;

(k) October 20, 2000 at 3:00 p.m. – Pretrial Hearing (status and motions);

(l) October 31, 2000 – Deadline for filing complaints for cases to be included in consolidated

trial. For civil actions filed subsequent to January 1, 2000, plaintiffs shall provide the baseline medical and factual information referred to in paragraph 5(c) within three weeks of filing of the civil action, or by October 31, 2000, whichever comes earlier. However, no plaintiffs' claims shall be included in this trial unless the aforesaid baseline medical and factual information has been provided to defendants by close of business on October 31, 2000;

(m) October 31, 2000 – Plaintiffs may supplement expert lay witness list by adding no more than three (3) expert or three (3) lay witnesses;

(n) November 17, 2000 – Plaintiffs designate exhibits and demonstrative materials applicable to each defendant which are intended for trial;

(o) December 1, 2000 – Defendants designate exhibits and demonstrative materials which are intended for use at trial;

(p) December 29, 2000 – Objections to plaintiffs exhibits and demonstrative material must be filed;

(q) January 26, 2001 – Objections to defendants' exhibits and demonstrative materials must be filed;

(r) February 5, 2001 – Beginning on or about February 5, 2001, the Court shall schedule a series of exhibit conferences. The initial conferences will involve exhibits purportedly applicable to all or substantially all of the defendants. The subsequent conference will be defendant specific. A defendant is only obligated to attend conferences related specifically to that defendant, including all

defendants and defendants-specific conferences. If a defendant does not attend unrelated exhibit conferences (i.e. unrelated other defendant conferences), such defendant does not waive any objections to the admissibility of any document preadmitted at such unrelated exhibit conference.

(s) February 5, 2001 – Discovery deadline;

(t) February 16, 2001 – All pretrial motions, dispositive motions and motions in limine must be filed;

(u) March 16, 2001 – All written responses to pretrial, dispositive motions, and motions in limine must be filed;

(v) April 6, 2001 at 1:00 – Hearing on all pretrial motions, dispositive motions, and motions in limine;

(w) May 14 -17, 2001 – Pretrial, settlement, and document conferences;

(x) June 4, 2001 – Jury selection and trial. By agreeing to specific dates included with the final scheduling order entered by the Court, no defendant waives any objection it may have to these proceedings. The objections and exceptions of all parties are noted, incorporated by reference, submitted for reconsideration, and preserved.

6. Discovery relevant to Phase II issues shall begin, if necessary, after consolidated trial of the common issues.

7. Should any plaintiff-specific discovery become necessary prior to the Phase I consolidated trial in order to preserve the testimony of a plaintiff reasonable and necessary discovery should be

commenced immediately following these provisions which shall be established and observed.

(a) Once a specific plaintiff is designated as needing to have his or her testimony preserved, plaintiffs' counsel shall have five (5) days to turn over copies of all medical records concerning that plaintiff in their possession along with an executed authorization and answers to the defendants first set of interrogatories.

(b) The deposition of the designated plaintiff can be noticed anytime after ten (10) business days from the turning over of the indicated materials;

(c) The deposition of the designated plaintiff shall be limited to four (4) hours or whatever time period the plaintiff's treating physician feels that plaintiff can bear, including a reasonable period of time for breaks and meals.

ENTERED this 11th day of January, 2000

s/ Hon. Arthur M. Recht

ARTHUR M. RECHT, JUDGE

s/ Hon. Tod Kaufman

TOD KAUFMAN, JUDGE

APPENDIX J

[List of Plaintiffs With Claims Pending in Civil Action No. 00-C-5000 (As of December 13, 2007)]

Accord, Ronald

Adamchuk, Linda

Adams, Patten Ray

Adkins, Beulah F. and Donald Adkins

Adkins, Charles H.

Adkins, Oscar J.

Adkins, Roy W.

Adkins, Roy W., for the Estate of Betty J. Adkins

Akers, Billie J.

Akers, Gracie, and Virgil E. Akers, her husband

Akers, Nancy, for the Estate of Maurice Akers

Albright, George

Aliff, Milton Gilbert, and Rita Jean Aliff, his wife

Allen, Kelly

Altenburg, Gary, and Robin M. Altenburg, his wife

Amabile, Ralph, and Kathleen Amabile, his wife

Anderson, Mary F., for the Estate of Alfred Anderson

Anderson, Wesley R.

Ankrom, Robert, and Francis Ankrom, his wife

Ankron, Tammy

Aqzmll, Robert

Arbogast, Mary Lee

Arrington, Dorothy, and Bob Arrington, her husband

Ashbury, Ella

Ashley, Judy Ellen, and Tom F. Ashley, her husband

Atkinson, Daniel W., and Lois Atkinson, his wife

Austin, Robert and Nancy Austin

Badgett, Avin T.

Bailey, Camilla, and Kermit Bailey, her husband

Bailey, Irene

Baldwin, Paul, and Linda Baldwin, his wife

Ball, Carolyn Ann

Ball, Frank W., for the Estate of Jeff W. Ball

Ball, Lidburn Conrad

Barbara J. Hickman Cottrill, Administratrix for the Estate of Lonnie Eugene Cottrill

Barber, Suzetta, for the Estate of Eva L. Bonnette

Bardwil, Joyce C.

Barnes, Roger L., and Pamela Barnes, his wife

Barton, Donald P.

Barton, Larry D., and Carolyn Sue Barton, his wife

Bartram, Billy R., and Betty C. Bartram, his wife

Basham, Clarence, and Sandra Basham, his wife

Batliff, Roger D.

Baum, Willard Thomas

Beard, Melvin E.

Belcher, Robert J.

Bennett, Ermel R., and Betty A. Bennett, his wife

Bennett, Jo Lynn

Berry, Phillip E.

Berryman, John Walker, and Edna M. Berryman, his wife

Beula Williams, Individually, and as Executrix for the Estate of Floyd Williams

Bickerstaff, Thomas E.

Bishop, Lester and Wanda Bishop

Bissett, Frank, and Gladys Bissett, his wife

Black, Tim

Blackwell, Joan, and Jasper Blackwell, her husband

Blain, Rosemary (Adminstratrix for the Estate of Howard Wayne Blain)

Blake, Patricia L., and Ray E. Blake, her husband

Bland, Sarah L, Executrix of the Estate of Bland, John Jr.

Blankenship, Constance B.

Blankenship, Dallas

Blankenship, Maggie as Administrator of the Estate of Dorsey Ray Blankenship

Blankenship, Rosella for the Estate of Jack Swick

Boggs, Oscar

Boggs, Worthy

Bolin, Manuel F. and Nancy L. Bolin

Bolt, James A.

Bonar, William, and Joanne Bonar, his wife

Boner, Barbara

Boone, Rebekah R. (Executor of James Edward Boone)

Boothe, Woodrow W., and Sabrina Kay Booth, his wife

Bostick, Mona

Botkins, Gary W., and Mary A. Botkins, his wife

Bourne, Roger Lee

Bowder, Carroll B., and Debra Bowder, his wife

Bowen, Kenneth and Opal Bowen

Bowen, Nicky

Bowles, Richard, and Bonnie J. Bowles, his wife

Bowman, Jimmy Lee, and Laurie A. Bowman, his wife

Bowyer, Guy W., and Debbie S. Bowyer, his wife

Boyd, Carolyn

Boyd, Karen

Bradshaw, Robert L. and Barbara Bradshaw, his wife

Brady, Anna, and Gary Brady, her husband

Bragg, Harold, and Violet C. Bragg, his wife

Bragg, Margaret, and Homer E. Bragg, Sr., her husband

Bragg, Violet C., and Harold Bragg, her husband

Bravo, Ruby, and Jose Bravo, her husband

Brewster, Johnny, and Silbie Brewster, his wife

Brewster, Phillip G., and Nila Brewster, his wife

Britt, Daniel Melvin, and Pearl P. Britt, his wife

Britt, Pearl P., and Daniel M. Britt, her husband

Brock, Ruth V.

Brogan, Posey H. and Lois Jean Brogan

Brooks, Kathy

Brotosky, Guy Franklin, Sr.

Brown, Earnest (Executor of Mary A. Brown Anderson)

Brown, Kathelene, and Paul D. Brown, her husband

Brown, Mary J.

Brown, Priscilla

Brown, Roberta J., for the Estate of John M. Brown

Browning, Billy C. and Nancy Browning, his wife

Browning, Jackie, Sr., and Stella Browning, his wife

Browning, Jeanette M., for the Estate of Robert H. Browning

Browning, Peggy Sue

Brumfield, Dorothy (Executrix for Joe Brumfield)

Bryant, Brenda G., and Agie Bryant, her husband

Bryant, Donna (Executrix of Madeline Carter)

Bryant, Michael E.

Buckley, Sarah

Burdette, Clark, and Toni Burdette, his wife

Burdette, Samuel E. and Norma Jean Burdette

Burger, Gloria, for the Estate of Retonda A. Georghetti

Burgess, Charles, and Joy Burgess, his wife

Burns, Louis F., and Betty L. Gilbert Burns, his wife

Burton, Mary A.

Butler, Delores J., and Thomas G. Butler, her husband

Byus, Cylinda Faith, Executrix for Thomas Kevin Byus

Canady, Earl Jr.

Canterbury, Wanda J.

Carmichael, Nellie J.

Carte, James

Carte, Lowell David, Sr., and Linda H. Carte, his wife

Carter, Nola as Administratrix of the Estate of Dallas Carter

Caruthers, Greg

Casto, Clarice Ann and Richard Casto, her husband

Chafins, Janice, and Chester Chafins, her husband

Chapman, Pearl, for the Estate of Charles E. Chapman

Childers, Jacqueline

Church, Benjamin and Mattie Elizabeth Church, his wife

Cisco, Clyde

Clark, Christella, and Stanley L. Clark, her husband

Clark, George

Clark, James

Clark, Robert James Jr.

Clark, Roy Alfred, and Terri Ann Thomas, his wife

Clarke, Edwin

Clay, Linda L. (Executrix of the Estate of Darrell Taylor Clay)

Clayton, Carl J. and Nellie L.

Click, David L. (Personal Representative of Lewis R. Click and Anne C. Click)

Cline, Bernice, and Bennett Cline, her husband

Cline, Donald L., for the Estate of Donna S. Cline

Cline, Gerald, and Barbara Cline, his wife

Cline, Margaret for the Estate of Minnie M. Collins

Cohernour, Alicia

Coleman, Imogean and Raymond L. Coleman

Coleman, Peggy for the Estate of Everett Coleman

Collett, John H.

Compton, Joel and Sarah Compton

Conley, Charles R., and Elline Conley, his wife

Cook, William H.

Cool, Rita K., for the Estate of Lonzo Cool

Cooper, Hazel

Cooper, Larry Cooper, Lolita J.

Copley, James E., and Lula M. Copley, his wife

Cottle, Donald E., and Kimberly J. Cottle, his wife

Cottrill, Charlene Ann and Robert L. Cottrill

Counts, Marilyn L. and Frowdie Counts

Crabtree, Dale

Craddock, Gretchen, for the Estate of Lewis D. Craddock, Jr.

Craft, Clinton

Craft, Jimmy L.., for the Estate of Martha A. Craft

Crites, Genevieve (Administrtrix of the Estate)

Cunningham, Buddy L. (Executor of Emozette Cunningham)

Cunningham, Harold

Cunningham, Roy L., and Nelda Jean Cunningham, his wife

Curry, Arbutus and Billy Joe Curry, her husband

Cutlip, Darrell Eugene and Joyce Cutlip

Dalton, Dannie

Daniel, Katherine

Danny Anderson Administrator of Ruth E. Anderson

Darlene M. Wilkins, individually and as Administratrix for the Estate of Ruth A. Morrow

Davis, John

Dawson, Larry A., and Lauren R. Dawson, his wife

Dean, Bonnie

Dean, Charles K. (Executor of Charles R. Dean)

Dean, Patty

Debold, Joseph M. and Marjoles A. DeBold, his wife

Deel, Anna R.

Defoe, Patty

Deloris, Executrix

Dennis A. Wayne, Administrator of the Estate of Charles W. Wayne

Denny, Dawnie C., and Roscoe Denny, her husband

Deweese, Arthur, and Betty Deweese, his wife

DiBacco, Abe Lincoln (Executor for James DiBacco)

DiGirolamo, Della M. (Executrix of the Estate)

Dillard, James Fred, and Jennifer Dillard, his wife

Dillon, Bessie, for the Estate of Basil R. Dillon

Dillon, Billy David, and Mary Ruth Dillon, his wife

Dingess, Brenda K., and Norman P. Dingess, her husband

Dingess, Louis F., and Linda M. Dingess, his wife

Dingess, Neal

Dingess, Simon, and Josie Lee Dingess, his wife

Dingess, Wilma (Personal Representative for Grover Dingess)

Diveley, Pamela G.

Dolan, Reba

Donley, Richard E.

Donna L. Gregory (Executrix for James Whaley)

Downs, Judith Ann

Duffield, Bonnie L. and Harry G. Duffield

Duncan, Mary (Executor of Earl Howard Duncan)

Dunlap, Charles D., and Sandra Dunlap, his wife

Durbin, Kathleen for the Estate of Harold Durbin

Eads, Patrick C., and Debbie F. Eads, his wife

Easley, Eugene T.

Edwards, Charles Clinton (Executor of Kines Faye Humphreys)

Elkins, Roy Marie

Ellis, Lou Ellen, and Dadle Ellis, her husband

Elmore, James D.

Emmons, Patricia

English, Jack

Eplin, Judith for the Estate of Paul E. Eplin

Erwin, Keennen Allen

Eskew, William F., III

Evans, Inas M. for the Estate of Albert Evans

Farley, Carol M., and Gilmer G. Farley, her husband

Farley, Johnny

Farren, Tyrone Ashby, and Waynette Farren, his wife

Ferguson, Brian K., and Kathy A. Ferguson, his wife

Ferrell, Larry

Fife, Ogburn W., Jr.

Flenniken, James E.

Forgacs, Donna, and James A. Forgacs, her husband

Fortner, Jonda S., and George E. Fortner, her husband

Fox, Andrew, Jr.

Fox, Gary L., and Betty C. Fox, his wife

Francis, Donald M., and Mary E. Francis, his wife

Freeman, Herman (Adminstrator of S. Irene Freeman)

French, Howard

French, Linda R., for the Estate of Velma Justine Adkins

Frey, Lawrence

Frye, Arlie Ray, and Doris Fay Frye, his wife

Frye, Martin J.

Fuller, Donald (Executor of Elosie Fuller)

Furrow, Violet

Garaffa, Vincent R., and Eula M. Garaffa, his wife

Gauze, William D. (Administrator of Phyllis J. Gauze)

George, Bobby Ray, and Hope George, his wife

Gibson, Jimmy and Anna Gibson, his wife

Gillespie, Mary Francis (Administratrix of Hollis F. Gillespie)

Gilman, Betty J.

Gilman, Timothy (Administrator for Cefford Gilman.)

Glah, Robert F.

Gnojek, Lorraine A., for the Estate of John A. Gnojek

Goff, Johnny F. for the Estate of Virginia A. Fisher

Goldman, William, and Zenna June Goldman, his wife

Gomez, Ignacio

Gordon, Ray

Gray, Carolyn S., and Ronald L. Gray, her husband

Gray, Harold, and Patsy Gray, his wife

Gray, John

Greathouse, John A.

Green, Jesse D.

Greenlief, Marilyn

Gross, Charles, and Wilma Gross, his wife

Groves, Robert

Grubb, Sherry and Wetzel Grubb, her husband

Haderman, Mary G.

Hager, Homer Albert and Barbara Hager, his wife

Hagerman, Geneva

Hairston, Evelyn R.

Hairston, Mary Nettie Perkins

Hale, Gordon Lee, and Annie Marie Hale, his wife

Hale, Kenneth D., and Patricia A. Hale, his wife

Hall, Cora L.

Hall, Jerry

Hall, Mary Francis, Executrix for the Estate of Donald Lee Hall

Hamblin, Timothy

Hammond, Anna Catherine

Hanshaw, Melvin

Harbert, Robert Lee

Hardin, Charles L., Jr.

Hardin, Monroe, and Mark Hardin, her husband

Hardy, John

Harless, Donald Delano for the Estate of Wanda Gail Harless

Harmon, Robert L.

Harmon, William D., Jr. and Deanna M. Harmon, his wife

Harper, Drucilla

Harper, Gary W.

Harris, Janet S., and James D. Harris, her husbands

Harrison, John P.

Harrison, Wanda J., and Howard N. Harrison, her husband

Hart, Jackie (Administratrix of Janice P. Hart)

Hatfield, Leena Avis, and Robert G. Hatfield, her husband

Hatfield, Shirley J. for the Estate of Henry D. Hatfield

Hayes, Dotty Lou Hayes, and John B. Hayes, her husband

Haynes, James R.

Haynes, Lula

Heaster, Basil R.

Hedrick, James for the Estate of Betty R. Hedrick

Hensley, Martha, and Ralph Hensley, his wife

Hersley, Jackie L.

Hibbs, Minerva Ruth and Charles

Hibner, Larry R.

Hicks, Donald L.

Hieneman, Mary A.

High, Curtis, Jr.

Hightower, Darlene Shawntonya, for the Estate of Brenda Highertower-Casey

Hill, Paul

Hineman, Linda J., and James E. Hineman, her husband

Hise, Callie M., and Edwards Samuel, her husband

Hodges, Joyce Ann, and James C. Hodges, her husband

Hogsett, Charles H., and Patricia Hogsett, his wife

Hoover, Louise S.

Hoppenworth, Ann S.

Hopwood, Melvin L., and Sandra K. Hopwood, his wife

Horn, Brenda

Howard, Mike

Howell, Gladys

Hudek, Patricia, and Adam J. Hudek, her husband

Huffman, Cleo M. (Personal Representative for Allen Huffman)

Hughes, Kathy

Hunley, Nannie, and Franklin Hunley, her husband

Hunter, Robert H., and Helen L. Hunter, his wife

Husty, Thomas P. and Marianne E.

Hyder, Betty J. and James E. Hyder, her husband

Jackson, Angela M., and Robert Lee, her husband

Jackson, Dewey Sr. for the Estate of Minnie M. Lockhart

Jackson, Robert, and Angela M. Jackson, his wife

James, Gene A., and Patricia James, his wife

Jeffries, Allen

Jeffries, W.E., Jr., and Linda L. Jeffries, his wife

Jenkins, Tina and James, for the Estate of Octavia Gross

Jennings, Christopher

Jerry W. Hodge, Executor of the Estate of Mabel Lois Hodge

Johns, Alva

Johnson, A.J., and Brenda Kay Johnson, his wife

Johnson, Ermal for the Estate of Gerald D. Johnson

Johnson, George O.

Johnson, Joann

Johnson, Johnny

Johnson, Karen L. for the Estate of Lemma Johnson

Johnson, Lemma, Administratrix

Johnson, Rita (Administratrix of Sampy Davis Keene)

Johnson, Robert K., and Carolyn Johnson, his wife

Jones, Betty S., for the Estate of Eulah May Mullins

Jones, Lillie M., and Herman R. Jones, Jr.

Jones, Oscar John, Jr.

Jones, Richard H., and Barbara Ann Jones, his wife

Jones, Sarah E., and Gerry F. Jones, her husband

Joplin, James, and Wanda Joplin, his wife

Jordan, Cortland A. and Betty Jordon for Allen Cortland Jordan

Joyce Wickline, Administratrix for the Estate of Jackie J. Wickline

Judith P. Bailey and Constance A. Young, Co-Executrixes for the Estate of Lena M. Wilkinson

Justice, Erma J.

Justice, Sheila Kay

Kandis, Charles S., and Betty A. Kandis, his wife

Kathleen K. Cash, Personal Representative for the Estate of Annabell Randolph

Keeney, Harry B., and Virginia D. Keeney, his wife

Keffer, David R., and Dolly Keffer, his wife

Kennedy, Glenna A. and John L. Kennedy

Kennedy, Hobert, and Juanita Kennedy, his wife

Kennedy, Richard E., and Anne E. Kennedy, his wife

Kessler, John Everett, and Pamela J. Kessler, his wife

Keyes, Opal L.

Kidd, Albert

Kimble, Wayne

King, David (Executor of Thurman Roosevelt King)

King, Elenor

King, Fredrick, and Wilma King, his wife

King, John Edward, and Judith Diane King, his wife

King, Judith (Administratrix of Beatrice Humphreys)

King, Wanda P., and Terry A. King, her husband

Kingrey, Ronald K.

Kinser, Dorothy for the Estate of Herbert Kinser

Kinsmore, Flora J., and Justin J. Kinsmore, her husband

Kirby, David Earl, and Dorothy L. Kirby, her husband

Kirk, Bessie Joan , and William Franklin Kirk, her husband

Koontz, Larry D., and Elaine F. Koontz, his wife

Krajnak, Steve and Helen Krajnak, his wife

Kupner, Blanch for the Estate of Ralph Kupner

Lake, Frederick L.

Lamb, Linda (Executor of Mark Douglass Lamb)

Lambert, Doris (Executor of John Jones)

Lanham, Geraldine E.

Lankford, William

Lawhun, Becky (Adminstratrix to Wanda Frazier)

Lawrence, Vicci

Lawson, Shirley , and Allen Lawson, her husband

Leach, Paul H., and Helen C. Leach, his wife

Leake, Carl F. (Executor to Brenda Joy Leake)

LeBrun, Gladys, Executrix of the Estate

Leonard, Robert I.

Lewis, Anthony

Lewis, Danny A., and Faye Lewis, his wife

Lewis, Paul

Lightner, Shirley for the Estate of Victoria Ruie Perry

Likens, Robert H.

Linda K. Ellis and William E. Keeney, individually and as co-Administrator/Administratrix for the Estate of Erma E. Keeney

Linger, Ethel

Linville, Howard

Lish, Beatrice, and Edward Lish, her husband

Lockard, Willard

Lockhart, Karen

Lockhart, Melda for the Estate of Robert Lockhart

Logue, Deloris J.

Long, Rosie, and Billy C. Long, her husband

Long, Sally V. (Administratrix to Leslie D. Long)

Long, Wanda

Lopez, Catherine

Loudin, William II

Lovejoy, Betty

Lovejoy, Tracy Renee, and Charles Franklin Lovejoy, Jr., her husband

Lucion, Peggy and Jack Lucion, her husband

Luckhart, Gary S.

Lumpkin, Richard Lee

Lyons, Kathy for Estate of Douglas Lyons

Mackey, Maxine V. and Frank Mackey, her husband

Maglietta, Carl, Sr. and Sara Maglietta, his wife

Mahon, Randy N.

Mahone, Lossie

Malcolm, Donnie Sr. and Beverly R. Malcolm, his wife

Malena, Richard

Mallett, Albert Ray, Administrator of Wilma Mallet)

Mallory, Phillis G. for the Estate of Christine Moubray

Mallow, Shirley, and Ray Mallow, her husband

Maness, Ruth

Marcum, Dessie

Marcum, Everette

Marcum, Sena

Marcus, Claudette for the Estate of Jessie Hairston

Marjorie Wright, Individually and as Power of Attorney for Sanford Floyd Marlow

Marson, James D.

Marteney, Mary, for the Estate of Orville E. Edens

Martin, James

Martin, Mary and Aaron Martin Jr., her husband

Mayle, Dorothy M.

Maynard, Dorothy

Maynard, James B. and Rhonda L. Maynard, his wife

Maynard, Marie as Representative of the Estate of Wilda Workman

Maynard, Marvin and Teresa Maynard, his wife

Maynard, Ronald L.

Maynor, Carol

Mayo, Richard L. and Blanche Mayo, his wife

Mays, Wilma Jean, and John D. Mays Sr., her husband

McAdams, Kenneth R., Sr. and Sherri J. McAdams, his wife

McCallister, Bernard

McClanahan, Jr., Charles and Gilda M. McClanahan, his wife

McClellan, Donald

McClelland, Robert, and Glonda McClelland, his wife

McCloud, Hershel

McCutcheon, Ruby M.

McElfresh, Robert

McFarland, Gobel

McFeeley, Sherri D., and Richard L. McFeeley, her husband

McGee, Lilla

McGhee, Rodney

McGraw, Patricia A., and James D. McGraw, her husband

McNelly, Carolyn C., Executrix of Harry R. McNelly

McPeak, Mary

Meadows, Mark Kevin, and Rhonda Meadows, his wife

Meadows, Sandra, for the Estate of Larry R. Meadows

Melloy, Gary L.

Merolle, George, and Mary Merolle, his wife

Miller, Anthony J. (Adminstrator of Sandra K. Miller)

Miller, Betty C. (Executor of Lester H. Miller Sr.)

Miller, Donna E.

Miller, Doris

Miller, Joseph E. (Administrator of Geraldine E. Miller)

Miller, Patrick Joseph

Miller, Paul Edward and Lora Suzanne Miller, his wife

Miller, Wallace

Mitchell, Donna

Mitchell, Janet Gay

Mitchell, Richard A., and Thelma Mitchell, his wife

Mitchem, George S. (Executor of Mary Fern Mitchem)

Mitchem, Roger

Mitchem, Thersea for the Estate of Willie A. Mitchem

Mitros, Hilda

Moomaw, Susan M. and Fredrick A. Moomaw, her husbands

Moore, Faye and Okey J. Moore, her husband

Moore, Harold D.

Morgan, John C., and Carolyn D. Morgan, his wife

Morris, Linda (Personal Representative of the Estate of Clifford Morris)

Moss, Teddy Lewis

Moubray, Kathleen

Mounts, Kenneth, Executor

Muldrew, Eula

Mullenex, John

Mullens, David E., and Patricia A. Mullens, his wife

Mullins, Christine

Mullins, Ernest

Mullins, Mary

Mullins, Paul

Mullins, Shirley

Mullins, Wilma J.

Muncy, Herbert

Murphy, Daniel

Murphy, Jancy Lea

Murphy, Margaret

Musick, Marvin Wayne and Janet Musick, his wife

Myers, Larry A. for the Estate of Lloyd Wright

Mynes, Minnie L.

Nagle, Robert Joseph, and Sondra Nagle, his wife

Navarro, Donald, and Tina Navarro, his wife

Naylor, Eva Marie

Nelson, Burley and Bonnie Nelson, his wife

Nemeth, Jonathan

New, Edsel and Joyce B. New, his wife

Newkirk, Sinette (Personal representative of Delbert Newkirk)

Nickelson, Guy William

Noel, Thomas

Noland, Edna Joyce for the Estate of Earl Noland Sr.

O'Connor, Diana O'Connor for the estate of Donald E. O'Connor

O'Connor, John P. and Judy C. O'Connor, his wife

O'Dell, Louise

Oley McNeely, Jr., and Oma McNeely, his wife

Ondeck, Mary and Andrew F. Ondeck, Jr.

O'Neal, Lloyd

Osborn, Raymond and Phyllis Osborn, his wife

Owens, Todd

Pack, Dana

Pack, Rebecca Thomas, and Ronnie Pack, her husband

Painter, Veeta D. (Executor of Rosetts Lee Jenkins)

Panel, Constance

Parsons, Dale W., and Rhoda G. Parsons, his wife

Parsons, Margaret L.

Paul Nichols, Executor for the Estate of Golie B. Gibson

Pauley, Vernon L., and Linda S. Pauley, his wife

Paxton, Gary G.

Paxton, Joanne for the Estate of Roy Paxton

Peeks, Eula

Pelay, Hazel R., and Paul Pelay, her husband

Pemberton, Betty

Penland, Francis

Peringer, Freddie R.

Perkins, Ada Faye

Perkins, Mary Anna

Persinger, Carol

Pettigrew, Mark T.

Peyton, Gary R.

Phares, Wilma Jean , and Thomas A. Phares

Phillips, Cathleen Renee (Administratrix to Kevin R. Phillips)

Pickle, Janice for the Estate of Nelson R. Pickett

Plumley, Drenda

Poling, Bobby

Porch, Thomas for the Estate of Tillie V. Porch

Porterville, Donna

Postaliwait, Bonnie M.

Potts, Patricia J., and James F. Potts, her husband

Prahl, Judith P. and Charles K. Prahl, her husband

Preece, John W.

Price, Howard L. Jr. and Mildred I. Price

Price, Richard and Mary Alice, his wife

Prince, Brookie

Prochaska, Wilma Maureen, Executrix of the Estate of Ralph A. Prochaska

Pyles, Richard A. and Virginia M. Pyles, his wife

Querry, Dempsey and Sharon Faye Querry, his wife

Quesenberry, Carl E. and Brenda S. Quesenberry, his wife

Raines, Ira Homer and Brenda Louise Raines, his wife

Ramsey, Robert H. and Darla Ramsey

Randolph, Mary L. and James W. Randolph, her husband

Ranson, Jerry

Ratliff, Robert

Ray, Larry R. and Jennifer Ray, his wife

Raymond, Robert

Reed, James

Reed, Robert Alan and Candace R. Reed, his wife

Rexroad, Raymond

Rexrode, Joseph

Reynolds, Shirley

Riser, Judy

Riser, Robert

Risse, Lois J.

Ritchie, Paul Cyrus and Patricia A.

Ritenour, Diana (Administratrix of Carl A. Simmons)

Ritter, Gary

Roberts, Paul

Robertson, Deborah L. and Dale E. Robertson, her husband

Robinete, Lawrence

Robinson, Kenneth

Roland G. Taylor, Administrator

Ronald Berry, as Personal Representative for the Estate of Viola I. Meadows

Rose, Gerald Jackson Sr. and Rachel L.

Rose, John

Rose, Marcus R.

Rosencrance, Faye L. , and Gary L. Rosencrance, her husband

Rosencrance, Gladys E.

Russnak, James Robert

Ruthledge, Clyde B., and Naoma R. Ruthledge, his wife

Scarberry, Barbara

Scarberry, Betty

Scarberry, Fielding and Bethel Scarberry, his wife

Schultz, Otto

Scott, Jack

Sears, Jack

Selbaugh, Lewis R., and Dollie Belle Selbaugh, his wife

Setliff, Jerry Luther and Mary Ann Setliff, his wife

Setliff, Mary Ann, and Jerry Setliff, her husband

Severt, Thomas, and Alice Severt, his wife

Shaffer, Shelby, and Lela Shaffer, his wife

Shamblen, Delores Executrix of the Estate of Jack Elswick)

Shamblin, Perry Allen and Shirley Ann Shamblin, his wife

Sharon K. Clay, Executrix for the Estate of Naomi Lee Stone

Sharp, Dana J., and Patricia Marie Sharp, his wife

Shatley, Miles S. and Wilda L. Shatley, his wife

Shaver, David G., and Kathryn Wilson Shaver, his wife

Shepard, Harrison

Sheppard, Joyce

Short, Joe A., and Trivless L. Short, his wife

Shott, Mark S., and Karen L. Shott, his wife

Shrader, Thomas and Daisy Shrader, his wife

Shreve, Billy T.

Simms, Leonard

Sinecoff, Joann, and Randolph Sinecoff, her husband

Six, Danny R., and Deborah C. Six, his wife

Skeen, Julie Michelle Executrix for the Estate of Gary Curtis Holbrook

Slack, Hearkdean

Slater, Regina

Sloan, Constance A.

Small, Deloris, and Robert C. Small, her husband

Smith, Basil, and Sandra L. Smith, his wife

Smith, Billy J., and Carmen D. Smith, his wife

Smith, David M.

Smith, Glenna Faye

Smith, Jacqueline, for the Estate of Paul E. Smith

Smith, Minnie and Daniel B. Smith, her husband

Smith, Timothy R., and Judy A. Smith, his wife

Smith, William F

Smith, Wilma Anne

Sneed, Blanche for the Estate of John C. Sneed

Snodgraft, John B., and Sandra L. Snodgraft, his wife

Snodgrass, Janie Lou, for the Estate of Robert L. Kuhn

Snyder, Charles A.

Snyder, Richard E.

Songer, Richard Allen, and Judith Ann Songer, his wife

Sopala, Brenda

Sopsher, Connie (Administratrix to Ruth V. Tashe)

Sorrell, Donald

Spade, Lesley E.

Spangler, Tina Nunley for the Estate of Marvin Pennington, Sr.

Sparks, Patricia A.

Spear, Norene

Speece, Dorothy (Executor of Thurman Speece)

Spencer, Allen

Spencer, Bonita

Spring, James for the Estate of Patricia Ann

Spring,

James Spring for the Estate of Milford V. Spring

Spurlock, Ruth

St. Clair, Margaret

Staats, Billy Joe and Rose Mary Staats, his wife

Stamper, Marie

Stanley, David A., and Brenda L. Stanley, his wife

Stanley, Kenneth E.

Stapleton, Nicky R.

Steep, Juanita J.

Stein, Charles L., and Irene E. Stein, his wife

Stella Walker, as Administratrix of the Estate

Stephens, Tex

Stephens, Valerie, and Jerry W. Stephens, her husband

Stevey, Jannette E. and Herbert E. Stevey, her husband

Stewart, Hal, and Phyllis Stewart, his wife

Stewart, Kent F.

Stewart, Larry, and Marjorie Stewart, his wife

Stiltner, Patty

Stockton, Clarence E. (Administrator of Heloise B. Stockton)

Stump, James

Sturgell, Julie Ann and Sherman E. Sturgell, her husband

Sublett, Patty J.

Summerfield, Vauna R., and Edmond Summerfield, her husband

Susie M. Brown, Administratrix for the Estate of Arthur D. Brown

Sweeney, Billy

Taylor, Lisa

Taylor, Ronald

Terrell, William S.

Tessner, Goldie M., and Vance Tessner, her husband

Testerman, Don, and Anna Testerman, his wife

Thomas, Carey L.

Thomas, Donald for the Estate of Betty Marie

Thomas, Donald G.

Thomas, Joy

Thompson, Bennie Joe (Executor of Carol M. Thompson)

Thompson, Harold Joseph

Thompson, John Michael, and Laura Rose Thompson, his wife

Tichenor, Virginia for the Estate of Velma D. Wilfong

Tiller, Joe F.

Tipton, Eddie Marlow, and Leona F. Tipton, his wife

Toland, Dorothy L.. and Clarence Toland, her husband

Townley, Thomas R.

Vance, Irene for the Estate of Jessie Vance

Vance, John Walter and Paula Jane Vance, his wife

Varney, Kenneth E. and Barbara Varney, his wife

Vickers, Clifford M.

Vuskirk, Steve

Wade, Sylvia D., and Cecil Wade, her husband

Wadell, Maurice for the Estate of Emma Lucille Wadell

Walls, Donald

Walls, Merlen Jean (Executor of Delmas Walls)

Walls, Rosa Lee

Walls, Williams Amos, and Betty Neal Walls, his wife

Ward, James

Ware, Julie F.

Washington, Dorothy

Watkins, Linda for the Estate of Claude Watkins

Watson, Shannon and James E. Davis, Jr., her husband

Webb, John L. and Linda F. Webb, his wife

Weese, Brenda for the Estate of Ava Marie Ross

Weese, Elsie (Administratrix of Leonard J. Weese)

Weidensall, William

Weikel, Jeanne

Weikel, Richard and Jeanne S. Weikel, his wife

Wesolowski, Margaret and James P. Wesolowski, her husband

West, Acie J.

West, Cheryl

Wetherholt, John

Whitaker, Delbert

White, Barbara J.

White, Ilean

White, Mac L.

White, Rodney

Whitehair, Dolores

Whitley, William, and Norma Whitley, his wife

Whytsell, Shirley

Wileman, Gary

Williams, Delores for the Estate of Carroll V. Williams

Williams, Henry and Iris

Williams, Roger

Williams, Scott

Williamson, Melvin

Wilson, Eugene T., and Vickie L. Wilson, his wife

Winston, Rae Anne

Winters, Judy for the Estate of Vernon W. Winters

Withrow, Harry, and Doris M. Withrow, his wife

Withrow, Robert for the Estate of Lois Withrow

Wolfe, Rita

Wood, Catherine B. for the Estate of Edward L. Wood

Woods, Hansford Ray and Dolores

Woods, Robert D. and Della M. Woods, his wife

Worrell, Arnetta for the Estate of Roger Worrell

Wright, Edwin D. and Avis M. Wright, his wife

Wright, Shirley

Wriston, Ronnie Orville , and Carol Jean Wriston, his wife

Wyatt, Lewis for the Estate of Gladys D. Wyatt

Yakovsky, Mike for the Estate of Violet Marie Yakovsky

APPENDIX K
[List of Defendants Not Party To the Writ of Prohibition Proceeding In the Supreme Court of Appeals of West Virginia]

Anchor Tobacco Company

Big Bear, Inc. (n/k/a the Penn Traffic Company)

Brooke Group Limited

Conwood Company, L.P.

Go-Mart, Inc.

John Middleton, Inc.

The Kroger Company

Liggett Group, Inc.

Liggett & Myers Inc.

McClure Company, Inc.

Montgomery Group, Inc. (d/b/a the Tobacco Express)

National Tobacco Company, L.P.

Old Tyme Kettle Korn, Inc. (d/b/a the Cigarette Store & More)

Parkway Super Market and Carter Enterprises, Inc. (d/b/a the Tobacco Hut)

The Pinkerton Tobacco Company

Rite Aid of West Virginia, Inc.

Stogie's Tobacco & Beverage, Inc.

Swisher International, Inc.

Troy's Poor Boy Market

U.S. Smokeless Tobacco Company

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SUPREME COURT, U.S.

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No. 07-806

In the Supreme Court of the United States

PHILIP MORRIS USA INC., BROWN & WILLIAMSON HOLDINGS, INC., LORILLARD TOBACCO COMPANY AND R.J. REYNOLDS TOBACCO COMPANY,

Petitioners,

v.

RONALD ACCORD, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to The Supreme Court of Appeals of West Virginia

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause bars a bifurcated trial plan, whereby the first phase of the trial determines the liability issues common to all defendants, entitlement to punitive damages and a punitive damages multiplier and the second phase of the trial determines individual issues and the compensatory and punitive awards.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT 1

REASONS FOR DENYING THE PETITION ... 9

I. A DECISION IN THIS CASE WOULD VIOLATE THIS COURT'S "DEEPLY ROOTED" DOCTRINE NOT TO PASS ON QUESTIONS OF CONSTITUTIONALITY UNLESS SUCH ADJUDICATION IS UNAVOIDABLE. 12

II. IN *WILLIAMS*, PHILIP MORRIS ADMITTED AND THIS COURT HELD THAT EVIDENCE OF HARM TO OTHERS IS RELEVANT TO THE DETERMINATION OF A PUNITIVE DAMAGES MULTIPLIER. 14

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

CASES

BMW, Inc. v. Gore,
517 U.S. 559 (1996) 10

Clinton v. Jones,
520 U.S. 681 (1997) 13

Garnes v. Fleming Landfill, Inc.,
413 S.E.2d 897 (W.Va. 1991) 3, 10

In re Tobacco Litigation,
624 S.E.2d 738 (W.Va. 2005) 7

Mayer v. Frobe,
22 S.E. 58 (W.Va. 1895) 10

Philip Morris USA v. Williams,
127 S.Ct. 1057 (2007) 4, 7, 8, 10, 11, 12, 14,15

State ex rel. Appalachian Power Co., et al. v. MacQueen,
479 S.E.2d 300 (W.Va. 1996) 9

State Farm v. Campbell,
538 U.S. 408 (2003) 6, 7, 10, 14

TXO Production Corp. v. Alliance Resources Corp.
509 U.S. 443 (1993) 10

RULES

W. VA. TR. CT. R. 26.01 5

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT

The courts of West Virginia have adopted a consolidated approach to the adjudication of torts in cases involving defendants whose products and actions have harmed many. In the present case, the Defendants knowingly sold defective cigarettes to West Virginia smokers who subsequently developed smoking-related diseases. During the operative period of this lawsuit, the Defendants entered into and maintained a conspiracy involving common tortious conduct directed against the Plaintiffs. For example, the Defendants agreed not to market a truly safer cigarette and not to perform animal research on their premises. The Defendants also uniformly claimed that their particular brand of cigarettes was safer in an effort to "reassure" addicted smokers to continue smoking, despite their knowledge that these allegedly "safer" cigarettes were actually more dangerous than traditional cigarettes. The Defendants commonly understood that cigarettes were addictive and manipulated the delivery of the addictive drug, nicotine, in their cigarettes to make them more addictive. The list of the Defendants' common tortious conduct is voluminous and fills millions of pages of their own internal documents. Each Plaintiff involved in this case claims injury caused by the same product, cigarettes, and the

common conduct of the Defendants.[1] In short, the products, conduct and subsequent harm at issue in Phase I are similar and apply equally to all Defendants and all Plaintiffs.[2]

If the more than 1,000 individual cases involved in this action were treated in the traditional course of litigation, the West Virginia court system would need to devote at least 180 judge years to these trials. Many, if not most, of the Plaintiffs would die before their individual case was tried, thus affording the Defendants a free pass for the majority of their tortious conduct.[3] This approach would ensure that

---

[1] The Phase II jury will have the ability to find against any plaintiff who does not fit within the framework of the "common liability" in the Phase I jury's verdict. The Phase II jury and reviewing judge will also have the ability (and duty) to award no punitive damages, ratchet the punitive damages award up or down, or even overturn the Phase II jury's individual damages verdicts, based on the individual facts of each case. The myriad of future contingencies argue against this Court's involvement in Phase I of this trial. *See* Section I, *infra*.

[2] Petitioners' Writ discusses "twenty other Defendants", but fails to inform this Court that all non-cigarette claims and parties were long ago severed from these proceedings by the state court.

[3] The Defendants convinced the trial court to dismiss with prejudice all claims of any Plaintiff that died during the pendency of this case without a deposition. More than 263 Plaintiffs were dismissed with prejudice as a result of this ruling. Although the trial court later reinstated these Plaintiffs, it designated their claims as "encumbered" and allowed the Defendants to perform extensive individual discovery on these claims, including 688 depositions, blanket medical authoriza-

the worst offenders in our society could escape liability because of the magnitude of the harm caused by their conduct and would deprive individual plaintiffs of the most sacred of all due process rights — their lives.

Phase I of this trial is scheduled to begin on March 18, 2008. In that proceeding, the jury will determine the "[g]eneral liability issues common to all defendants" and "entitlement to punitive damages." January 11, 2000 Case Management Order/Trial Plan, Petitioners' App. 70a-71a. If the Phase I jury determines that the Defendants' conduct merits punitive damages under existing West Virginia law, the same jury will determine a punitive damages multiplier. Petitioners' App. 71a. A different jury will later apply this multiplier to all Plaintiffs who recover compensatory damages in Phase II.[4] Petitioners' App. 71a. Therefore, the Phase I jury will have no ability to punish or deter any Defendant. This fact alone is determinative of

---

tions and written discovery.

[4] Under West Virginia law, the trial court and appellate court must review every punitive award with an eye to the reasonableness of that award. *See* Syl. Pts. 4 and 5, *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W.Va. 1991). The trial court maintains discretion to adjust the punitive award up or down depending on the individual circumstances of each case. *Id.* at Syl. Pt. 4 ("Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur . . . .").

Petitioners' due process complaint, since the Phase I jury will have no ability to deprive the Petitioners of any property. *See Philip Morris USA v. Williams*, 127 S.Ct. 1057, 1059 (2007) ("Thus, the Constitution imposes limits on both the procedures for *awarding* punitive damages and *amounts* forbidden as 'grossly excessive'") (emphasis added). As a result, the issue of whether individual issues will be tried in Phase I is irrelevant to a due process inquiry.[5]

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[5] Petitioners' claim that "almost no plaintiff-specific discovery has been permitted" is false. In fact, this case was recently continued for an entire year because the Petitioners insisted on their right to take 688 individual depositions of the family members of deceased Plaintiffs. 8/18/06 Hearing Trans. at 30-31. Defendants were also provided "baseline" information on every Plaintiff involved in this case more than 7 years ago, including: (1) the brands of cigarettes smoked and the duration for each brand; (2) the places where these cigarettes were purchased; (3) each Plaintiff's diagnoses, and; (4) each Plaintiff's address, phone number and social security number. In addition to this "baseline" information, the Defendants were provided extensive responses to interrogatory requests more than 7 years ago, including, but not limited to, each Plaintiff's: (1) medical history; (2) family history, including medical and marital history; (3) employment history; (4) education; (5) criminal history; (6) insurance coverage, and; (7) involvement in other litigation.

In 2001, the Plaintiffs also provided a detailed, 70-page explanation of their claims in this case in response to the Defendants' contention interrogatories. Plaintiffs have supplemented these responses twice. Based on this wealth of information, Defense counsel informed the state court that they were ready to try Phase I of this case in 2001:

MR. HEIM (LEAD COUNSEL FOR DEFENSE):

"I think we are pretty close to both sides understanding

1. On September 28, 1999, the Chief Justice of the Supreme Court of Appeals for West Virginia entered an administrative order consolidating all tobacco-related personal injury suits then pending in West Virginia and transferring them to the Circuit Court of Ohio County for coordinated proceedings. The initial claims were consolidated under West Virginia's mass-litigation procedure, Trial Court Rule 26.01, the relevant section of which defines "mass litigation" as "two (2) or more civil actions pending in one or more circuit courts . . . (b) involving common questions of law or fact in 'personal injury mass torts' allegedly incurred upon numerous claimants in connection with widely available or mass-marketed products and their manufacture, design, use, implementation, ingestion,

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what it is that's going to be tried."

11/2/01 Hearing Trans. at 15-16.

Therefore, the Defendants in this case have been given an unprecedented opportunity to discover the individual circumstances of the Plaintiffs. Defendants will be allowed to use this information to defend against each Plaintiff's claims in Phase II, which will involve the "individual issues of the Plaintiffs." At that time, Defendants will have a full opportunity to present a complete defense based on the individual circumstances of each Plaintiff prior to the entry of a single penny in punitive damages. As a result, the issue of whether individual issues will be tried in Phase I is irrelevant to a due process inquiry, since the Phase I jury will have no ability to punish the Defendants, but only determine whether the Defendants are liable for punitive damages and subsequently determine a punitive multiplier.

or exposure . . . ." W.Va. Tr. Ct. R. 26.01.

More than 1,000 additional plaintiffs later joined the consolidated proceeding, all alleging injury from their use of tobacco products. The Plaintiffs filed responses to Defendants' discovery in March, 2000, informing Defendants of the specific injuries suffered by each Plaintiff. *See* Baseline Medical and Factual Information for the Plaintiffs on the September 6, 2000 Complaint. The initial injuries alleged by the Plaintiffs were narrowed in the course of discovery to 20 injuries commonly caused by cigarettes. The initial theories of liability were also narrowed or dismissed by Defendants' unrelenting defense of these claims. *See, e.g.*, Order Regarding September 14, 2006 Hearing (dismissing Plaintiffs' fraudulent concealment claims only 6 months before trial). In 2001, Defendants informed the state court that they "understood" the Plaintiffs' claims and implicated that they were prepared for the Phase I trial. November 2, 2001 Hearing Trans. at 15-16. The state court later severed all non-cigarette Defendants and issues from the Phase I trial. Stipulation and Order, dated December 3, 2001.

2. After entry of the current Trial Plan, the Defendants certified the same question now at issue in their writ of certiorari — namely, whether *State Farm v. Campbell* requires that "the defendant's conduct be tailored to each plaintiff (i.e., precludes evidence of harm to others)." West Virginia's high court answered the certified question in the negative, holding that "in application of [Campbell] to the instant case, it is the role of the circuit court to

ensure that the plaintiffs' evidence is relevant, reasonably related to the acts upon which liability is premised, and supports their claim for punitive damages. Therefore, we find nothing in the circuit court's original trial plan that prevents the admission of evidence that is proper under *Campbell*." *In re Tobacco Litigation*, 624 S.E.2d 738, 742 (W.Va. 2005), Petitioners' App. 39a.

3. On remand, the trial court emphasized repeatedly that its initial interpretation of *State Farm* was wrong — i.e., *State Farm* did not require that "the defendant's conduct must be tailored to each plaintiff." *See, e.g.*, September 18, 2007 Hearing Trans. at 28-29. ("[T]he Supreme Court didn't just send [the due process issue back] — they threw it back. In terms of being wrong, I was 100 percent wrong, according to them"). As a result, the trial court reinstated the Trial Plan and refused to act on the Defendants' multiple subsequent requests to vacate the Trial Plan, stating that "I feel stronger than ever that it is a proper plan." May 23, 2007 Hearing Trans. at 8, Petitioners' App. 24a.

4. On February 20, 2007, this Court issued its decision in *Philip Morris USA v. Williams*. This Court's decision was based, in part, on Philip Morris' submitted jury instruction and subsequent argument that evidence of harm to others is relevant to the determination of a punitive damages multiplier. 10/31/06 Hearing Trans. at 11:2-10, *Philip Morris USA v. Williams*, Oral Argument before the United States Supreme Court; *Philip Morris USA v. Williams*, 127 S.Ct. 1057, 1064 (2007) ("Philip Morris,

in turn, does not deny that a plaintiff may show harm to others in order to demonstrate reprehensibility. Nor do we"). At the same time Philip Morris was taking this position in *Williams*, it was taking a completely contrary position before the West Virginia courts — i.e., the use of harm to others evidence in the determination of a punitive damages multiplier is strictly forbidden by due process. *See* Defendants' Motion to Vacate the Trial Plan in Light of *Williams* at 19-20 ("In *Williams*, the United States Supreme Court rendered an unequivocal prohibition against the assessment of punitive damages based in any part on harm to others"). Despite Philip Morris' disingenuous assertions, the trial court again denied Petitioners' Motion to Vacate the Trial Plan on May 23, 2007 and reaffirmed its decision to proceed under the bifurcated trial plan. Petitioners' App. 24a.

5. Petitioners then filed a second petition for a writ of prohibition in the West Virginia Supreme Court, again arguing that this Court's decision in *Williams* bars the use of evidence of harm to others in the determination of a punitive damages multiplier. Emergency Petition for Writ of Prohibition at 14 ("Each Plaintiff would be entitled to [a] punitive damages [multiplier] based on evidence of conduct toward and harm sustained by other persons . . . ."). Defendants made this argument despite their knowledge that every Plaintiff in Phase I was harmed by the Defendants' defective cigarettes and common tortious conduct. The West Virginia Supreme Court denied the petition without comment on November 7, 2007, having already decided the issue against Defendants in 2005. Petitioners' App. 1a-2a.

REASONS FOR DENYING THE PETITION

Judge Arthur M. Recht is currently presiding over the largest consolidation of tobacco personal injury cases ever ordered by any court in the country. More than 1,000 Plaintiffs asserting the same claims based on 50 years of Tobacco Industry misconduct directed toward these West Virginia Plaintiffs and others have been joined together for trial.[6] Determining an efficient and just way to try more than 1,000 cases in a single court is critical to the proper resolution of these cases. A recent study concluded that the disposition of 1,000 similarly complex claims, if treated in the traditional course of litigation, would require approximately 150 judge years.[7] *See, e.g., State ex rel. Appalachian Power Co., et al. v. MacQueen*, 479 S.E.2d 300, 303-304 (W.Va. 1996) (*citing* Jack B. Weinstein, Individual Justice in Mass Tort Litigation 140 (1995)). Therefore, an inefficient trial plan would practically deny a

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[6] Petitioners claim there are only 735 Plaintiffs in this consolidated action. This discrepancy in the number of Plaintiffs is due to the Petitioners' successful requests to dismiss with prejudice all claims of any Plaintiff who dies before completing his/her deposition testimony. This request by the Petitioners and subsequent action by the state court is, of course, a real deprivation of due process and a blatant violation of the West Virginia Wrongful Death Act.

[7] The parties have estimated that each of these individual tobacco cases would take approximately 6 weeks to try. Even if the circuit court were able to set 6 individual tobacco cases per year (thereby consuming at least 80% of the court's docket), it would take more than 180 years to try all the currently pending cases.

substantial portion of these terminally-ill Plaintiffs their day in court.[8]

On January 11, 2000, Judge Recht adopted a bifurcated trial plan in which the initial trial phase would resolve "[g]eneral liability issues common to all defendants" and "entitlement to punitive damages." 1/11/00 Case Management Order/ Trial Plan ¶ 3(a), Petitioners' App. 70a-71a. The second phase of the trial would determine the "individual claims of the plaintiffs" and compensatory and punitive damages.[9] Petitioners' App. 71a. Under the current Trial Plan, no Defendant will be punished until the Phase II jury determines a punitive damages award (if any). As a result, the issue of punishment central to the

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[8] In fact, almost 300 Plaintiffs have already died during the 10-year pendency of this case.

[9] Defendants campaigned from the very beginning of this litigation for a trial plan that would try these cases individually. Their argument of choice was that the trial plan was "unconstitutional." For more than 4 years, Defendants filed a constant stream of briefs attacking the constitutionality of the court's bifurcated trial plan. The state court upheld the bifurcated plan under existing United States Supreme Court precedent, including *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) and *BMW, Inc. v. Gore*, 517 U.S. 559 (1996) and West Virginia Supreme Court precedent, including Syl. pt. 1, *Mayer v. Frobe*, 22 S.E. 58 (W.Va. 1895) and Syl. pt. 3, *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W.Va. 1991). Defendants requested a certified question before the West Virginia Supreme Court twice over the last 2 years based on this Court's decisions in *State Farm* and *Williams*. Both requests were denied. Importantly, the West Virginia Supreme Court held on both occasions that the Trial Plan does not violate the Defendants' due process.

Petitioners' request for a writ is nothing more than a future contingency. This Court should not consider the Petitioners' analysis of the reasonableness of a hypothetical and wholly speculative punitive damages award.

In regard to the punitive damages multiplier that is at issue in Phase I, this Court recently held:

> [W]e recognize that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few. And a jury consequently may take this fact into account in determining reprehensibility.

Williams, 127 S.Ct. at 1065.

At the time *Williams* was decided, Philip Morris not only agreed with, but also strongly argued for this statement of the law:

> But ***as this Court has made quite clear***, the reprehensibility of the conduct is an important factor . . . So, more conduct that is calculated to harm large numbers of people can be found more blameworthy ***as to warrant a higher proportion, a higher relationship between the punitive and compensatory damages***.
>
> So there's a fundamental difference in that respect between considering and punishing for it, and the Court has said repeatedly [ ] that the character of the conduct can be considered in determining

> the proper level or allowable level of punitive damages . . . So I don't think it is proper to tell the jury that they may not consider the conduct without getting ourselves in serious trouble.

See, 10/31/06 Hearing Trans. at 11:2-10 and 12:10-21, *Philip Morris USA v. Williams*, Oral Argument before the United States Supreme Court (emphasis added).

In its current writ, Philip Morris seems to have forgotten its understanding of the difference between "punishing" and "considering."

I. A DECISION IN THIS CASE WOULD VIOLATE THIS COURT'S "DEEPLY ROOTED" DOCTRINE NOT TO PASS ON QUESTIONS OF CONSTITUTIONALITY UNLESS SUCH ADJUDICATION IS UNAVOIDABLE.

Defendants' writ is premised entirely on contingent future events that may not occur as anticipated or may never occur. The Phase I jury will have no ability to punish Defendants or award a single penny in punitive damages. This will be the sole province of the Phase II jury, who will hear evidence of the Plaintiffs' individual issues and Defendants' defenses to those individual issues and subsequently determine the compensatory and punitive damages awards. As a result, the Phase I jury will not have the ability to deprive the Defendants of any property and, therefore, the currently pending phase of this trial does not implicate due process. Of course, Phase II of this trial is at present wholly contingent on an affirmative decision of the Phase I jury regarding whether Defendants' conduct merits punitive damages. This

Court has never been in the business of deciding constitutional contingencies and should not involve itself in the review of theoretical punitive damages awards.

As this Court has consistently explained:

> If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality unless such adjudication is unavoidable. It has long been the Court's "considered practice not to decide abstract, hypothetical or contingent questions or to decide any constitutional question in advance of the necessity for its decision or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied or to decide any constitutional question except with reference to the particular facts to which it is to be applied. It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.

See, e.g., Clinton v. Jones, 520 U.S. 681, 690 (1997) (collecting cases).

II. IN *WILLIAMS*, PHILIP MORRIS ADMITTED AND THIS COURT HELD THAT EVIDENCE OF HARM TO OTHERS IS RELEVANT TO THE DETERMINATION OF A PUNITIVE DAMAGES MULTIPLIER.

Throughout the proceedings before the West Virginia circuit court, Defendants have maintained that this Court's precedents in *State Farm* and *Williams* require that each plaintiff's claim for punitive damages must be based solely upon the conduct that harmed that particular plaintiff. *See* Defendants' Motion to Vacate the Trial Plan in Light of *Williams* at 19-20 ("In *Williams*, the United States Supreme Court rendered an unequivocal prohibition against the assessment of punitive damages based in any part on harm to others"). This nonsensical rule would allow a defendant who harms thousands to escape liability due to the strong preclusive effect on harm to others evidence. Punitive damages would then bear an inverse relationship to the magnitude of a defendant's harm.

Of course, this Court's due process precedent, most notably *Williams*, dispels such a senseless and unjust interpretation:

> We recognize that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few. And a jury consequently may take this fact into account in determining reprehensibility.

Philip Morris USA v. Williams, 127 S.Ct. 1057, 1065 (2007).

Philip Morris itself recognized the relevance of harm to others evidence in determining a punitive multiplier when it persuasively argued the following to this Court in *Williams*:

> But as this Court has made quite clear, the reprehensibility of the conduct is an important factor . . . So, more conduct that is calculated to harm large numbers of people can be found more blameworthy as to warrant a higher proportion, a higher relationship between the punitive and compensatory damages.

10/31/06 Hearing Trans. at 11:2-10, *Philip Morris USA v. Williams*, Oral Argument before the United States Supreme Court; *see also Philip Morris USA v. Williams*, 127 S.Ct. 1057, 1064 (2007) ("Philip Morris, in turn, does not deny that a plaintiff may show harm to others in order to demonstrate reprehensibility. Nor do we").

CONCLUSION

Unless this Court decides to reverse *Williams* and adopt Philip Morris' revised understanding of due process constraints on punitive damages, the Petition for Writ of Certiorari should be denied.

Respectfully submitted.

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83

5

No. 07-806

In the Supreme Court of the United States

PHILIP MORRIS USA INC., BROWN & WILLIAMSON HOLDINGS, INC., LORILLARD TOBACCO COMPANY and R.J. REYNOLDS TOBACCO COMPANY,

Petitioners,

v.

RONALD ACCORD, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals Of West Virginia

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

A. Immediate Review Is Warranted Because Constitutional Harm Is Certain To Occur. 2

B. The Trial Plan Cannot Be Reconciled With *State Farm* Or *Williams*. 4

C. The Question Whether The Due Process Clause Forbids The Use Of "Reverse Bifurcation" To Assess Punitive Damages Is Squarely Presented, Is The Subject Of A Split Of Authority, And Is Recurring And Important 8

CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

Cases

Amchem Prods., Inc. v. *Windsor*,
521 U.S. 591 (1997) 6

Bandini Petroleum Co. v. *Super. Ct.*,
284 U.S. 8 (1932) 4

Burton v. *United States*,
196 U.S. 283 (1905) 3

Castano v. *Am. Tobacco Co.*,
84 F.3d 734 (5th Cir. 1996) 6

Clinton v. *Jones*,
520 U.S. 681 (1997) 3

Philip Morris USA v. *Williams*,
127 S. Ct. 1057 (2007) 2, 4, 5, 7, 8

Spector Motor Serv., Inc. v. *McLaughlin*,
323 U.S. 101 (1944) 3

State Farm Mut. Auto Ins. Co. v. *Campbell*,
538 U.S. 408 (2003) 5, 6, 7

In re Tobacco Litig.,
624 S.E.2d 738 (W. Va. 2005) 2, 9

White v. *Ford Motor Co.*,
500 F.3d 963 (9th Cir. 2007) 7

TABLE OF AUTHORITIES—continued

Page(s)

Rules

S. CT. R. 10(b) 9

Miscellaneous

Brief of *Amicus Curiae* Chamber of Commerce of the United States of America, *Philip Morris USA Inc.* v. *Accord*, No. 07-806 (U.S. Jan. 16, 2008).....2

Brief of *Amici Curiae* Ciba Corp., *et al.*, *Philip Morris USA Inc.* v. *Accord*, No. 07-806 (U.S. Jan. 16, 2008).....4, 9

Petition for Writ of Certiorari, *Mobil Corp.* v. *Adkins*, No. 02-132, 2002 WL 32134868 (U.S. July 24, 2002).....9

Reply Brief for Petitioner, *Philip Morris USA* v. *Williams*, No. 05-1256, 2006 WL 1267580 (U.S. May 8, 2006).....8

REPLY BRIEF FOR PETITIONERS

The Brief in Opposition ("Opp.") completely fails to come to terms with the essential and unavoidable constitutional problem identified by the Petition: This trial plan *guarantees* that punitive liability and punitive damages will be assessed in an arbitrary fashion that directly contravenes the due process precedents of this Court. It has two principal flaws. First, the Phase I jury will be asked to assess punitive liability, and to impose a punitive-damages multiplier, based entirely on aggregate proof. It will do so before compensatory liability has been determined for even a single plaintiff, before petitioners have had an opportunity to assert their affirmative defenses, and before it will be possible to get any sense of defendants' total compensatory liability. And second, the Phase I jury's findings will subsequently be applied in the trials of *all* the plaintiffs—even those who were not harmed by whatever conduct the first jury found to be egregious. Respondents nowhere explain how this approach to the assessment of punitive damages can be reconciled with the Due Process Clause.

Instead, they attempt to persuade this Court that it should stay its hand until *after* petitioners have been subjected to this unlawful trial procedure because the outcome of the trial is uncertain. But our due process challenge is *procedural*, and the procedure at issue here is set in stone. Respondents *agree* that West Virginia's highest court has twice rejected petitioners' constitutional objection to the trial plan (see Opp. 6, 10 n.9), and that the trial court has denied petitioners' requests that the trial plan be

amended. They *concede* that there is a clear split of authority among the lower courts. And they *concur* that "reverse bifurcation" is West Virginia's established method for trying mass-tort cases (Opp. 1), one that will not change until its courts receive a "clear indication" that this practice must end. *In re Tobacco Litig.*, 624 S.E.2d 738, 741-42 (W. Va. 2005). Thus, respondents admit what they could not plausibly deny: that the question of this trial method's constitutionality will recur until it is decided by this Court, and that it is exceedingly important to the litigation landscape. See Brief of *Amicus Curiae* Chamber of Commerce of the United States.

In sum, both by its words and by its silence, the brief in opposition adds to the mounting evidence that the time has come for this Court to review West Virginia's use of "reverse bifurcation" in mass-tort cases like this one, in which differently-situated plaintiffs propose disparate theories of liability resting on diverse allegations of harmful conduct.

A. Immediate Review Is Warranted Because Constitutional Harm Is Certain To Occur.

Respondents' argument that the constitutional harm posed by the trial plan is merely "contingent" (Opp. 11, 12) is meritless.

1. As respondents recognize, "the Constitution imposes limits on *both* the procedures for awarding punitive damages *and* amounts forbidden as 'grossly excessive.'" Opp. 4 (quoting from the reporter's syllabus to *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1059 (2007)) (emphases added). Petitioners' constitutional challenge is squarely directed at the *procedural* failings of the trial plan, which violates

due process by creating an undue risk that punitive liability and punitive damages will be determined in an arbitrary manner. See, *e.g.*, Pet. 12. There is nothing at all uncertain or contingent about the *procedure* that the West Virginia courts plan to employ in this case. To the contrary, as respondents concede (Opp. 7, 8), the trial plan's contours have been conclusively fixed by the trial court, notwithstanding Judge Recht's continuing expressions of constitutional concern (Pet. 9), and the Supreme Court of West Virginia has denied petitioners' request for relief. It is therefore clear that the West Virginia courts *will* employ this trial plan.

2. The constitutional-avoidance canon presents no obstacle to the Court's immediate review. The constitutional question presented in the petition rests on firm and unchanging ground—it is not "abstract, hypothetical or contingent." Opp. 13 (quoting *Clinton* v. *Jones*, 520 U.S. 681, 690 n.11 (1997)). There is no antecedent and uncertain question of state law that remains to be decided. See, *e.g.*, *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 104-05 (1944)). Nor has there been any suggestion that, after accepting jurisdiction, this Court could avoid the Due Process question presented in the petition by deciding the case on other grounds. See, *e.g.*, *Burton* v. *United States*, 196 U.S. 283, 295 (1905)). In contrast to *Clinton*, 520 U.S. at 690, moreover, this is not a case in which important constitutional questions lie beyond the scope of the questions presented in the petition. Rather, the precise question raised by petitioners is whether West Virginia's plan for adjudicating mass-tort cases of this kind is foreclosed by the Due Process Clause. See Pet. i. In sum, because the West Virginia courts' trial procedure is set and certain, the Court need not wait any

longer before assessing the trial plan's constitutionality. See *Bandini Petroleum Co.* v. *Super. Ct.*, 284 U.S. 8, 13-17 (1932) (granting review in advance of trial of order denying request for a writ of prohibition where petitioners contended that enforcement of a state statute would violate due process).

3. Any postponement of review would produce an enormous waste of judicial resources. Respondents offer a dubious calculation of the number of "judge years" it would take for the West Virginia courts to try plaintiffs' disparate claims separately (Opp. 9), but they fail to offer an analogous computation of the number of "judge years" that will be squandered in unsalvageable Phase II trials (*ibid.*) should the trial plan later be overturned. By any measure, the burden placed on the West Virginia courts if review were to be delayed while those tainted proceedings move forward in courtrooms all across West Virginia would be staggering.

The risk of wasted resources is all the more substantial because this case is only one of several large "reverse bifurcation" proceedings pending in that state, as the experience of numerous *amici* confirms. See Brief for *Amici Curiae* Ciba Corp., *et al.* Immediate review is the appropriate course.

B. The Trial Plan Cannot Be Reconciled With *State Farm* Or *Williams*.

This Court's punitive damages precedents establish, *inter alia*, that any assessment of punitive damages must be narrowly focused on the defendant's conduct toward the plaintiff, may be imposed only after a defendant has had a "full opportunity to defend against the charge," *Williams*, 127 S. Ct. at 1063, and must depend on whether and to what extent the

plaintiff's proven compensatory damages are insufficient to serve the state's objectives of punishment and deterrence. See Pet. 13. To this end, the Due Process Clause imposes an affirmative obligation on the state courts to establish procedures that protect against the *risk* that a jury will abandon its proper focus and instead mete out punishment based on its view that a particular defendant is "an unsavory individual or business." *State Farm Mut. Auto Ins. Co.* v. *Campbell*, 538 U.S. 408, 423 (2003). See also *Williams*, 127 S. Ct. at 1065.

The trial plan violates each of these commands because it establishes a procedure in which the jury, asked to assess whether any defendant's conduct warrants punitive damages, and if so, in what degree, will be unable to perform its task in a rational way. Rather, the Phase I jury will be compelled to speculate about such crucial questions as the number of persons harmed, if any, by each aspect of each defendants' conduct, the severity of any resulting injuries, and whether the law permits the defendants to be held liable for those alleged harms—none of that information will be known or knowable until Phase II. See Pet. 16-17. Moreover, by establishing a one-size-fits-all multiplier that will apply equally to all follow-on cases, no matter what the specific factual basis for the particular plaintiff's claim, the trial plan ensures that at least some plaintiffs—and perhaps every plaintiff awarded compensatory damages—will recover punitive damages for conduct that did *not* form the basis for the first jury's findings. See Pet. 18.

Without responding directly to these arguments, respondents offer two rationales for their assertion

that this trial plan can be squared with *State Farm* and *Williams*. Each is meritless.

1. First, respondents contend that the trial plan is constitutionally permissible because their claims are all alike: all 735 of them claim that they were injured as a result of smoking cigarettes. This commonality, they assert, is sufficient to warrant the trial of the hundreds of claims as an undifferentiated mass. This remarkable assertion is manifestly false: *State Farm*'s nexus requirement cannot be satisfied at that level of generality. First of all, the sale of cigarettes is not a tort. Each of the smokers in these consolidated cases must plead and prove a tort claim based on a particular set of allegations about particular defendants' conduct toward that smoker.

Second, the claims of plaintiffs who used different tobacco products produced by different manufacturers at different times, and who allege different injuries resulting from different types of conduct, are hardly uniform. This Court explained more than a decade ago that product-liability claims arising out of different factual circumstances must be treated as *different*, even when the same kind of product allegedly caused each plaintiff's injury: "These factual differences *** translate into significant legal differences." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 609 (1997) (internal quotation marks omitted). Accord *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 742 n.15 (5th Cir. 1996). Recognizing the disparities among plaintiffs' claims, respondents' counsel long ago conceded that "some of the issues that we will try [in Phase I] surely will not apply to everyone. Maybe some of them won't apply to anyone." Pet. 9.

2. The brief in opposition also asserts that *Williams* holds "that evidence of harm to others is rele-

vant to the determination of a punitive damages multiplier" (Opp. 14), and that this "holding" defeats our argument that each plaintiff's claim for punitive damages must be based on the harm done to that particular plaintiff. But due process requires more than that a jury charged with assessing punitive damages be presented only with relevant evidence. It also requires that the jury's *consideration* of that evidence be guided to guard against the risk that its conclusion will be arbitrary. *Williams*, 127 S. Ct. at 1062. Under this trial plan, the Phase I jury's determination cannot be adequately guided because it will not possess the necessary facts about the plaintiffs and their specific claims to decide whether or how the defendants should be punished for their conduct. Cf. *White* v. *Ford Motor Co.*, 500 F.3d 963, 975 (9th Cir. 2007) (evidence of plaintiffs' conduct is indispensable to jury's consideration of punitive liability and punitive damages because "reprehensibility is judged in relation to the conduct and actions of others, not merely by looking at [defendant's] conduct in the abstract"). Because of this core failing, the Phase I jury's findings will inevitably represent "not 'an application of law', but a decisionmaker's caprice.'" *Williams*, 127 S. Ct. at 1062 (quoting *State Farm*, 538 U.S. at 416, 418). Such "arbitrary punishments" are wholly inconsistent with Due Process even when based on relevant evidence. *Williams*, 127 S. Ct. at 1062. Accordingly, even if it were sound, this argument could not save the trial plan.

Second, and more fundamentally, the central holding of *Williams* was precisely that "a jury may not punish for the harm caused others." 127 S. Ct. at 1065. Although the jury may consider harms to nonparties in gauging the reprehensibility of the defendant's conduct, a plaintiff cannot recover punitive

damages for anyone's injuries but his own.[1] The trial plan violates that principle because it fails to ensure that each Phase II punishment is imposed only because, and to the extent that, the Phase I jury found the conduct that affected the specific Phase II plaintiff to be worthy of punishment. Pet. 18-19.

C. The Question Whether The Due Process Clause Forbids The Use Of "Reverse Bifurcation" To Assess Punitive Damages Is Squarely Presented, Is The Subject Of A Split Of Authority, And Is Recurring And Important.

Immediate review is warranted because the constitutional question whether "reverse bifurcation" may be employed to resolve aggregated punitive-damages claims in mass-tort cases is ripe for consideration, and because the Supreme Court of Appeals of West Virginia has decided this federal question "in a way that conflicts with the decision of another

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[1] Respondents' allegation that petitioner Philip Morris USA Inc. has advanced contrary positions on the proper role of evidence of harm to others is without foundation. See Opp. 8, 11-12. Petitioners affirmatively stated before the West Virginia Supreme Court of Appeals that reprehensibility "is a factor in assessing the amount of punitive damages," see Petitioners' Supplemental Submission In Support Of Petition For Writ of Prohibition, at 2. Philip Morris likewise argued to this Court in *Williams* that harm to others may be considered for the limited purpose of "assessing the reprehensibility of the specific conduct that injured the plaintiff." Reply Br. for Petitioner, *Philip Morris USA* v. *Williams*, No. 05-1256, 2006 WL 1267580, at *1 (U.S. May 8, 2006). Thus, neither in West Virginia nor in this Court has Philip Morris denied that "a plaintiff may show harm to others in order to demonstrate reprehensibility." *Williams*, 127 S. Ct. at 1064.

state court of last resort or of a United States court of appeals," S. CT. R. 10(b). See Pet. 20-23.

This question is also both recurring and important. The West Virginia courts have proclaimed that "reverse bifurcation" is their "system of mass-tort litigation," and will remain so until they receive a "clear indication" from this Court that this practice must end. *In re Tobacco Litig.*, 624 S.E.2d at 741-42. Until that day, it appears that one industry after another will be subjected to this unconstitutional and coercive trial procedure. Yesterday, it was asbestos defendants. See Petition for Writ of Certiorari, *Mobil Corp.* v. *Adkins*, No. 02-132, 2002 WL 32134868 (U.S. July 24, 2002). Today, it is tobacco defendants. And representatives of the chemical industry have announced that they will seek relief from "reverse bifurcation" in just a few weeks' time. See Brief for *Amici Curiae* Ciba Corp., *et al.*, at 4 & n.4. Others will surely follow.

This procession need not continue. This court should instead exercise its unquestioned jurisdiction to provide guidance on the crucial question whether punitive liability and punitive damages may be tried in the aggregate, in a mass-tort case involving diverse claims of misconduct, before a jury that knows nothing about the merits of any particular plaintiff's claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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81

In the Supreme Court of the United States

PHILIP MORRIS USA INC., BROWN & WILLIAMSON HOLDINGS, INC., LORILLARD TOBACCO COMPANY, and R.J. REYNOLDS TOBACCO COMPANY,

Petitioners,

v.

RONALD ACCORD, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Chamber of Commerce of the United States of America (Chamber) moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. Counsel for petitioners has consented to the filing of this brief. The Honorable Arthur M. Recht, Circuit Judge for the Circuit Court of Ohio County, West Virginia, who was named as a respondent to the petition for a writ of prohibition from which the instant petition arises, has also consented to the filing of this *amicus* brief. Counsel for the remaining respondents (plaintiffs below) have withheld consent.

The Chamber is the largest federation of business, trade, and professional corporations in the United States. It represents an underlying membership of approximately three million businesses and organizations of every size, in every business sector, and from every geographic region of the country. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

This is such a case. It presents this Court with a valuable opportunity to clarify and enforce the limitations placed by the Due Process Clause of the Fourteenth Amendment on the authority of state courts to abandon traditional, time-honored safeguards historically observed in the conduct of civil litigation. In recent years, state and federal courts have faced mount-

ing pressure to fashion novel methods for processing a rising tide of complex litigation, including mass-tort cases involving tobacco, asbestos, drugs, medical devices, automobiles, and other products, and sprawling class-action lawsuits against insurance companies, banks, and other businesses.

The circuit court here devised — and the Supreme Court of Appeals of West Virginia approved — a trial plan that casts aside crucial principles of due process articulated by this Court. As a result, business defendants in the West Virginia courts now face the prospect of litigating cases against hundreds of plaintiffs in which fundamental questions of liability and punitive damages are resolved without the introduction of any testimony or evidence specific to a particular plaintiff. Those procedures unfairly hamstring defendants and will yield arbitrary results.

This is no small concern. The massive stakes such litigation presents — and the unlikely prospects of ever vindicating valid legal defenses — drastically limit the practical ability of businesses to endure the ordinary risks of litigation. Moreover, modern mass-tort litigation is a ship capable of calling in any friendly port, and West Virginia consistently ranks as a haven for plaintiffs (and their counsel) seeking outsized recoveries. See HarrisInteractive, *2007 U.S. Chamber of Commerce State Liability Systems Ranking Study*, at 6, 10 (April 17, 2007), available at http://www.instituteforlegalreform.com/lawsuitclimate2007/pdf/Liability_System_Ranking_Study.pdf (nationwide survey of in-house attorneys and senior litigators revealed that West Virginia ranked 50th among states with judicial systems likely to "creat[e] a fair and reasonable litigation

environment"); American Tort Reform Found., *Judicial Hellholes 2006* at 11 (2006), available at http://www.atra.org/reports/hellholes/2006/hellholes2006.pdf (ranking West Virginia as "Hellhole # 1"). As a consequence of the decision below, West Virginia will become an even more powerful magnet for mass-tort litigation in the United States, with ripple effects felt throughout the national economy across a wide array of industries.

In the Chamber's experience, mass litigation in the state courts frequently results in serious threats to the federal constitutional rights of business defendants. The unorthodox trial plan adopted in this case is a prime example of that phenomenon. The Chamber has a substantial interest in ensuring the continued availability of review by this Court of decisions of the state courts that implicate important federal constitutional questions.

The Chamber's motion for leave to file the accompanying brief as *amicus curiae* should be granted.

Respectfully submitted.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The Reverse Bifurcation Procedure Devised By The Trial Court Contravenes This Court's Decisions Aimed At Ensuring That Even Unpopular Defendants Receive Due Process 5

II. This Court Need Not — And Should Not — Delay Review Of The Trial Plan 13

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases:

Blair v. *Equifax Check Servs., Inc.*,
181 F.3d 832 (7th Cir. 1999) 15

BMW of North America, Inc. v. *Gore*,
517 U.S. 559 (1996) 3, 5

Bradley v. *Appalachian Power Co.*,
256 S.E.2d 879 (W. Va. 1979) 7

Castano v. *Am. Tobacco Co.*,
84 F.3d 734 (5th Cir. 1996) 17

Cooper Industries, Inc. v. *Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) 12, 13

Gertz v. *Robert Welch, Inc.*,
418 U.S. 323 (1974) 5

Hodges v. *S.C. Toof & Co.*,
833 S.W.2d 896 (Tenn. 1992) 8

Honaker v. *Mahon*,
552 S.E.2d 788 (W. Va. 2001) 7

Honda Motor Co., Ltd. v. *Oberg*,
512 U.S. 415 (1994) 3, 5

In re Chevron, 109 F.3d 1016 (5th Cir. 1997) 14

TABLE OF AUTHORITIES — Continued

Page(s)

In re Lorazepam & Clorazepate Antitrust Litig.,
289 F.3d 98 (D.C. Cir. 2002) 15

In re Rhone-Poulenc Rorer Inc.,
51 F.3d 1293 (7th Cir. 1995) 14

In re Sumitomo Copper Litig.,
262 F.3d 134 (2d Cir. 2001) 15

International Brotherhood of Elec. Workers v.
Foust, 442 U.S. 42 (1979) 5

Lienhart v. *Dryvit Sys., Inc.*,
255 F.3d 138 (4th Cir. 2001) 15

Lindsey v. *Normet*, 405 U.S. 56 (1972) 6

Morris v. *Crown Equip. Corp.*,
633 S.E.2d 292 (W. Va. 2006) 20

Newton v. *Merrill Lynch, Pierce, Fenner
& Smith, Inc.*, 259 F.3d 154 (3d Cir. 2001) 15

Peters v. *Hobby*, 349 U.S. 331 (1955) 6

Philip Morris USA v. *Williams*,
127 S. Ct. 1057 (2007) . . . . . *passim*

Prado-Steiman v. *Bush*,
221 F.3d 1266 (11th Cir. 2000) 15

TABLE OF AUTHORITIES — Continued

Page(s)

State Farm Mut. Auto. Ins. Co. v. *Campbell*, 538 U.S. 408 (2003) ..... *passim*

Transportation Ins. Co. v. *Moriel*, 879 S.W.2d 10 (Tex. 1994) 8

Waste Mgmt. Holdings, Inc. v. *Mowbray*, 208 F.3d 288 (1st Cir. 2000) 15

White v. *Ford Motor Co.*, 500 F.3d 963 (9th Cir. 2007) 7

Constitutional Provision, Statutes and Rule:

U.S. Const. Art. IV 20

Cal. Civ. Code § 3295(d) (West 2007) 8

Minn. Stat. Ann. § 549.20 (West 2007) 8

W. Va. Code Ann. § 51-1-3 (West 2007) 12

W. Va. Code Ann. § 56-1-1(1)(a)(2) (West 2007) ... 21

W. Va. Code Ann. § 56-1-1(c) (West Supp. 2003) ... 20

Fed. R. Civ. P. 23(f) 14

TABLE OF AUTHORITIES — Continued

Page(s)

Miscellaneous:

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TABLE OF AUTHORITIES — Continued

Page(s)

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Fed. R. Civ. P. 23 Advisory Committee Note 15

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TABLE OF AUTHORITIES — Continued

Page(s)

W. Va. 2007 Session Laws,
Reg. Session (H.B. No. 2956) (Apr. 4, 2007) 20

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

STATEMENT

Respondents are more than 700 individual plaintiffs alleging personal injuries caused by their use of petitioners' tobacco products. Their lawsuits invoke assorted "theories of liability, including strict liability, negligence, breach of express warranty, fraudulent concealment, and civil conspiracy," and claim a variety of disparate injuries. Pet 6. Plaintiffs claim to have "used more than 200 different tobacco products" (not all of which are cigarettes) at various points in time. *Ibid.* Pursuant to West Virginia Trial Court Rule 26.01, *all* of these lawsuits were consolidated in a single proceeding

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[1] Pursuant to S. Ct. Rule 37.2 the Chamber states that the parties' counsel received timely notice of the intent to file this brief. Counsel for petitioners consents to the filing of this brief. The Hon. Arthur M. Recht, Circuit Judge for the Circuit Court of Ohio County, West Virginia, who was named as a respondent to the petition for a writ of prohibition from which this case arises, also consents to the filing of this brief. Counsel for the remaining respondents (plaintiffs below) withheld consent. The Chamber further states that no counsel for a party has authored this brief in whole or in part, and no counsel or party has made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

upon a determination that they contained *some* "common questions of law or fact" and that aggregation would be "expeditious."

At plaintiffs' invitation — and over defendants' repeated objections — the Circuit Court for Ohio County, West Virginia (Hon. Arthur M. Recht, presiding), adopted a two-phase trial plan to dispose of these cases. In Phase I, which is set to commence on March 18, 2008, a jury will decide "[g]eneral liability issues common to all defendants[,] including * * * defective product theory; negligence theory; warranty theory; and any other theories supported by pretrial development." Pet. App. 33a. The Phase I jury will also determine plaintiffs' "entitlement to punitive damages" and establish a multiplier for such awards, but it will hear no evidence regarding any individual plaintiff's conduct or entitlement to relief. *Ibid.* In Phase II, the trial court will convene separate proceedings before new factfinders to "address issues unique to each plaintiff's compensatory damages and any other individual issues in reasonably sized trial groups or on an individual basis." *Ibid.* The Phase II juries' compensatory awards will be automatically increased by any punitive damages multiplier set by the Phase I jury.

Defendants renewed their objections to this "reverse-bifurcation" trial plan in light of *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003). Judge Recht agreed that the plan could not be reconciled with *Campbell*, but the Supreme Court of Appeals of West Virginia reversed that decision. In the wake of this Court's decision in *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057 (2007), defendants unsuccessfully sought reconsideration in the trial court, and the West Virginia Supreme Court of Appeals summarily denied defendants' request for a writ of prohibition.

INTRODUCTION AND SUMMARY OF ARGUMENT

Recognizing that "[p]unitive damages pose an acute danger of arbitrary deprivation of property," *Honda Motor Co., Ltd.* v. *Oberg*, 512 U.S. 415, 432 (1994), this Court has repeatedly invalidated state trial practices that facilitate excessive and unprincipled awards. The trial plan adopted below and approved by the West Virginia Supreme Court of Appeals plainly violates those pronouncements and warrants this Court's immediate review.

I. The decision below flatly contradicts this Court's decisions in *Williams*, *Campbell*, and *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 565-66 (1996). Requiring the Phase I jury to decide essential questions "common" to all plaintiffs — including the availability and magnitude of punitive damages — before hearing evidence specific to any individual plaintiff violates this Court's admonition that a defendant facing punitive damages must have "an opportunity to present every available defense." *Williams*, 127 S. Ct. at 1063 (internal quotation marks omitted). Evidence regarding individual plaintiffs — *e.g.*, whether they used a particular product or were aware of its risks — is essential to mount a proper defense against plaintiffs' theories of liability and demands for punitive damages. Under the trial plan adopted here, however, such evidence is categorically excluded until *after* the Phase I jury has reached its verdict. Similarly, this Court warned in *Williams* that the jury ought not be left simply to speculate regarding critical details relevant to a proper analysis of the propriety of punitive damages, see 127 S. Ct. at 1063, but that is precisely what this trial plan requires. The trial plan also flatly ignores *Campbell*'s holding that there must be a specific nexus between the

evidence supporting a punitive damages award and the plaintiff's actual injuries. Here, the aggregation of plaintiffs with widely divergent cases and the deferral of all plaintiff-specific evidence guarantees that such a connection will be absent. Likewise, deciding the question of a punitive damages multiplier before a single compensatory damages award has been fixed prevents a proper assessment of the need for punitive damages in light of the magnitude of compensatory relief. The Supreme Court of Appeals either ignored those defects altogether or excused them on the (mistaken) belief that a Phase II jury or the trial judge can and will correct any errors.

II. This Court need not and should not await completion of those lengthy proceedings before reviewing these important issues. The aggregation of hundreds of plaintiffs — coupled with the distinctly plaintiff-friendly features of "reverse bifurcation" — exerts enormous pressure on defendants to settle these cases rather than face potentially disastrous liability at trial. As a result, this may well be this Court's only opportunity to assess the constitutionality of this trial plan. Moreover, if these cases ultimately do go to trial, it would be far more efficient to obtain this Court's guidance *now*, rather than after the trial court and the parties have devoted the enormous time and resources necessary to conduct proceedings that (we respectfully submit) are constitutionally dubious. And in the years it might take these cases to return to this Court, West Virginia (and other jurisdictions hoping to quickly dispose of mass-tort litigation) will subject numerous other defendants to this unconstitutional scheme.

ARGUMENT

I. The Reverse Bifurcation Procedure Devised By The Trial Court Contravenes This Court's Decisions Aimed At Ensuring That Even Unpopular Defendants Receive Due Process

As this Court has long recognized, "it cannot be ignored that punitive damages may be employed to punish unpopular defendants." *International Brotherhood of Elec. Workers* v. *Foust*, 442 U.S. 42, 50 n.14 (1979). Equally important, history teaches that no single class of defendants has a monopoly on a jury's sympathies or is immune from its prejudices. In some social and political climates, the target may be labor unions; in others, it may be management. *Ibid.* Or the jury's passions may be inflamed by political views that — in the heat of a particular moment — are deemed unpopular. See *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Most recently, the trend has been to levy massive awards against "big businesses, particularly those without strong local presences" in the jurisdictions where the cases are tried. *Honda Motor*, 512 U.S. at 432; see also, *e.g.*, *Campbell*, 538 U.S. at 417; *BMW*, 517 U.S. at 565.

To guard against the ever-shifting caprice juries may inflict upon a particular defendant, this Court has consistently enforced the Due Process Clause's requirement that reason, rather than mere "[c]ommunity hostility," guide juries' verdicts. *Foust*, 442 U.S. at 50 n.14. The trial plan adopted here flouts those principles at every turn, and this Court's review is necessary to make clear that such fundamental constitutional protections may not be cast aside in the name of expediency.

A. Perhaps most obviously, "the Due Process Clause

prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'" *Williams*, 127 S. Ct. at 1063 (quoting *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972)). But the system devised here does exactly that, allowing — indeed, *requiring* — the jury to decide essential questions of liability and to establish a punitive damages multiplier without hearing one word about whether a particular plaintiff is legally entitled to such relief. Moreover, although "[c]onfrontation and cross-examination under oath are essential, if the American ideal of due process is to remain a vital force in our public life," *Peters* v. *Hobby*, 349 U.S. 331, 351 (1955) (Douglas, J., concurring), not a single plaintiff will take the stand before the Phase I jury reaches its verdict. Far from being able to mount "every available defense," *Williams*, 127 S. Ct. at 1063 (internal quotation marks omitted), the defendants will be precluded from effectively presenting even their most basic answers to plaintiffs' allegations.

That risk is hardly speculative. For example, the plaintiffs here have alleged — among many other legal theories — that defendants are liable for failing to provide adequate warnings of risks associated with their products. In response, the defendants have asserted that plaintiffs "were warned or otherwise made aware of the alleged risks associated with smoking cigarettes, but chose to smoke cigarettes despite having that knowledge." Answer of Defendant Philip Morris Inc. to Plaintiffs' Complaint, *In re Tobacco Litig.*, Civil Action No. 00-C-5000 (W. Va. Cir. Ct.), at 40. How will the defendants be able to present that defense to the Phase I jury unless they are able to take discovery of individual plaintiffs and present relevant evidence to the jury? Likewise, how can the Phase I jury sensibly determine whether to impose punitive damages — much less to set

a specific multiplier by which all compensatory awards must be increased — before it has even heard evidence as to whether the individual plaintiffs were already aware of the health risks they claim should have been the subject of additional warnings? The trial plan raises such questions but offers no sensible answers. Instead, it leaves the jury unable to consider pivotal evidence and arguments before making dispositive findings regarding liability and punitive damages. See *White* v. *Ford Motor Co.*, 500 F.3d 963, 975 (9th Cir. 2007) (plaintiff's conduct must be assessed by jury in evaluating defendant's punitive liability).[2] That is precisely the manifest unfairness that the Due Process Clause prohibits. See *Williams*, 127 S. Ct. at 1063.

B. The trial plan also violates this Court's directive that courts must not introduce "a near standardless dimension to the punitive damages equation" by preventing the jury from considering the full range of circumstances relevant to that inquiry. *Williams*, 127 S. Ct. at 1063. As in *Williams*, the jury here will be asked to opine on the propriety of punitive damages but "will be left to speculate" on any number of important questions: "How many * * * victims are there? How seriously were they injured? Under what circumstances did injury occur?" *Ibid.* These are all potentially

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[2] There are numerous other defenses and arguments highly probative of the questions to be resolved in Phase I but that cannot be meaningfully considered by the jury. For example, evidence that plaintiffs were actually aware of the dangers of smoking would also be relevant to West Virginia's doctrine of "'modified' comparative negligence," under which "a party can recover damages in a tort action [only] 'so long as his negligence or fault does not equal or exceed the combined negligence or fault of the other parties involved in the accident.'" *Honaker* v. *Mahon*, 552 S.E.2d 788, 792 n.3 (W. Va. 2001) (quoting *Bradley* v. *Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979)).

significant factors in a jury's decision whether and to what extent punitive damages are appropriate, but the Phase I jury will be deprived of that crucial context.

That myopic view of the evidence only magnifies the risk — inherent in any case where the jury is asked to determine punitive liability and elements of compensatory liability simultaneously — that bias will infect the jury's verdict. Recognizing the hazards of presenting the inflammatory and prejudicial evidence often introduced during punitive damages proceedings before the jury has decided threshold questions of liability, several jurisdictions permit or require courts to *defer* consideration of the punitive-damages question. See, *e.g.*, *Hodges* v. *S.C. Toof & Co.*, 833 S.W.2d 896 (Tenn. 1992); *Transportation Ins. Co.* v. *Moriel*, 879 S.W.2d 10 (Tex. 1994); Cal. Civ. Code § 3295(d) (West 2007); Minn. Stat. Ann. § 549.20 (West 2007). Several leading organizations have called for the adoption of similar procedures.[3] West Virginia, by contrast, *accelerates* their consideration, even as it blocks the jury from evaluating a range of factors that might temper the jury's passions. Thus, the trial plan approved here not only injects

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[3] See American Bar Association, Section of Litigation, Special Committee on Punitive Damages, *Punitive Damages: A Constructive Examination* 6-3 - 6-4 (1986) ("It is apparent that the jury hearing evidence during the compensatory damages trial that is relevant only to the punitive damages claim (*e.g.*, the wealth of the defendant, other wrongful acts, the risks the defendant took) may be unduly influenced by that type of proof even on the issue of liability * * *."); American Law Institute, Reporters' Study, *Enterprise Responsibility for Personal Injury*, Vol. II at 264 (1991) ("[J]udges should have the power to bifurcate the trial in these cases so that the evidence and instructions specifically related to the punitive damages claim would be put to the (same) jury in a second proceeding *following* a positive verdict on the compensatory claim.") (emphasis added).

"standardless" speculation into the jury's assessment of punitive liability (in clear violation of *Williams*), it further opens the door for bias to influence the jury's entire verdict.

C. Likewise, the trial plan also ignores *Campbell*'s clear holding that conduct forming the basis of a punitive damages award "must have a nexus to the specific harm suffered by the plaintiff." 538 U.S. at 422. The plan requires Phase I jurors to evaluate whether punitive damages are appropriate — and, if so, to establish a multiplier to be applied to future compensatory awards — before hearing any evidence about "the specific harm" a particular plaintiff has suffered or how any such injury might relate to the conduct upon which a punitive damages award is based. Consequently, any "nexus" between the punitive damages finding and the actual harm a particular plaintiff might have suffered is purely coincidental.

As this Court explained in *Campbell*, "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant," *id.* at 423, but that is precisely what this trial plan would do. It asks the jury to hypothesize that the conduct supporting a punitive damages award would relate to every plaintiff's injury. To illustrate, suppose the Phase I jury concluded that the defendants' marketing of "light" cigarettes warrants the imposition of punitive damages and a particular multiplier. Such a finding would bear no connection to a plaintiff who later reveals (in discovery or at trial) that he did not even smoke light cigarettes. Thus, contrary to the clear holding of *Campbell*, this trial plan authorizes the Phase I jury to assess whether defendants ought to be punished x times over for conduct that may be — and in many instances no doubt

will be — entirely unrelated to a particular plaintiff's injury.

The West Virginia Supreme Court of Appeals acknowledged *Campbell*'s holding that "'[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages,'" Pet. App. 39a (quoting 538 U.S. at 422-23), but it failed to apprehend how that principle is utterly irreconcilable with the trial plan at issue here. Rather, that court casually dismissed *Campbell*'s guidance because "the facts in [that case] were quite extreme." Pet. App. 39a. But there is nothing in *Campbell* to suggest that the nexus requirement must be enforced only in "extreme" cases.

Moreover, it is no answer to suggest that such errors could be addressed in the Phase II proceedings. See Pet. App. 39a, 41a-42a & n.4. For starters, the *mere potential* for correction does not automatically ensure due process. To the contrary, this Court has held that "state courts cannot authorize procedures that create an unreasonable and unnecessary *risk*" that punitive damages awards will be based on illegitimate considerations. *Williams*, 127 S. Ct. at 1065 (emphasis added). Far beyond creating the "risk" of unconstitutional awards, this trial plan — coupled with the elimination of a class-certification process designed to ensure that the aggregated plaintiffs present predominately common claims — effectively *guarantees* significant and repeated errors. The Phase I jury will consider an amalgam of evidence, only some of which is pertinent to a given plaintiff, and render a verdict on the propriety and magnitude of a punitive damages award for every plaintiff. Standing alone, that fundamental error renders the trial plan unconstitutional regardless of what may happen in Phase II.

In any event, it is difficult to see how Phase II proceedings would reliably establish a constitutionally adequate nexus. The trial plan contemplates that the Phase II jury will decide only questions of causation specific to a particular plaintiff and make findings on the appropriate compensatory damages. Those damages *automatically* will be increased according to the Phase I jury's constitutionally deficient multiplier. The Phase II jury's verdict will thus suffer from the same flaw inherent in the Phase I multiplier. And, contrary to the (unexplained) assertion of the West Virginia Supreme Court of Appeals, the Phase II trial judge cannot simply "ensure that the plaintiffs' evidence is relevant, reasonably related to the acts upon which liability is premised, and supports their claim for punitive damages." Pet. App. 39a. That is because evidence supporting the decision to award punitive damages already will have been admitted (and the multiplier established) in Phase I, long before the circuit judge is even capable of comparing it to the evidence regarding a particular plaintiff's injuries in Phase II. The time to ensure that only constitutionally appropriate evidence supports a punitive damages award is when the jury is considering the propriety and magnitude of a punitive damages award.

D. The trial plan also frustrates compliance with this Court's instruction to assess the need for and magnitude of punitive damages in light of the size of the compensatory award. See *Campbell*, 538 U.S. at 425; *BMW*, 517 U.S. at 582. Here, the Phase I jury will be asked to set a multiplier without knowing what the compensatory damages will be or even hearing evidence regarding the injuries suffered by a particular plaintiff. Jurors therefore will have no way of knowing whether "compensatory damages are substantial," which would warrant "a lesser ratio, perhaps only equal to compensatory damages." *Campbell*, 538 U.S. at 425. To be sure,

the Phase II trial judge must review the "disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award," *id.* at 418, but this is just another way in which the trial plan adopted below *predicts* error by the jury in the hope that the judge will be willing and able to correct every mistake. As noted above, this Court has held that state courts may not "authorize procedures that create an unreasonable and unnecessary *risk*" of constitutional error, *Williams*, 127 S. Ct. at 1065 (emphasis added), but that is what this plan plainly intends.

West Virginia's reliance on such a scheme is particularly problematic because that State has no intermediate appellate court to which a defendant may appeal as of right. W. Va. Code Ann. 51-1-3 (West 2007). If defendants fail to convince the trial judge that a final award is constitutionally infirm, their only recourse is discretionary review by the Supreme Court of Appeals, which historically grants less than one-third of petitions to review civil judgments. See Supreme Court of Appeals of West Virginia Statistical Report 5 (2005), available at http://www.state.wv.us/wvsca/clerk/statistics/2005StatRept.pdf. As this Court has recognized, however, close appellate scrutiny of a trial court's review of punitive damages awards may correct significant errors in the lower court's analysis. See *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 440-43 (2001) (holding that district court's review punitive damages award subject to *de novo* appellate review and highlighting numerous errors in the district court's analysis). Under the trial plan approved here, the defendants face potentially staggering punitive damages awards that are likely to be reviewed only by a single judge. The suggestion that such meager judicial review will take proper account of the constitutionally necessary relationship between

compensatory and punitive damages awards (and of other constitutional requirements, see, *e.g.*, *id.* at 440) is cold comfort indeed. A system so deliberately indifferent to the risk that a punitive damages award will be constitutionally deficient does not comport with the fundamental guarantees of due process.

II. This Court Need Not — And Should Not — Delay Review Of The Trial Plan

As petitioners correctly note (Pet. 1), the order of the Supreme Court of Appeals denying their petition for a writ of prohibition is fully amenable to this Court's immediate review. What is more, that Court's lengthy majority and concurring opinions leave no doubt that the West Virginia courts will not fully correct the numerous constitutional defects inherent in the trial plan. Those flaws are manifest, and this Court need not await the predictable and severe prejudice they will inflict upon defendants and their shareholders.

But there are still more (and perhaps less obvious) reasons why this Court's immediate review is necessary. First and foremost, this scheme puts enormous pressure on defendants to settle, rather than risk massive and multiple punitive damages awards; consequently, the instant petition may present this Court's only opportunity to decide these important questions. Moreover, there are obvious advantages to deciding these threshold issues *before* the trial court and the parties devote massive resources to executing a constitutionally dubious trial plan. And in the years it likely would take this case to wind its way back to this Court, West Virginia will continue to attract and subject mass-tort litigation to this bizarre trial scheme.

A. This petition may well be this Court's only opportunity to pass on the significant constitutional

questions presented here. That is because reverse bifurcation of large, aggregated cases places enormous pressure on defendants to settle, rather than endure proceedings in which the outcome is all but predetermined, the financial consequences are potentially disastrous, and the chance of meaningful appellate review is slim.

Federal courts recognize that, in certain cases involving the aggregation of numerous plaintiffs and the concomitant prospect of massive liability, delaying review is tantamount to denying it altogether. As Judge Posner has explained, deferred review "will come too late to provide effective relief" for some defendants due to "the sheer *magnitude* of the risk to which [an aggregation plan] * * * exposes them." *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995) (granting extraordinary remedy of mandamus to review questionable class certification). Accordingly, defendants facing potentially massive damages awards produced by flawed trial procedures, "may not wish to roll [the] dice" to fully litigate the issue and "will be under intense pressure to settle." *Id.* at 1298; see also *In re Chevron*, 109 F.3d 1016, 1022 (5th Cir. 1997) (Jones, J., specially concurring) (mandamus review of trial plan in a mass proceeding of 3,000 cases "aggregated for trial management" was necessary because "[t]he pressure on the parties to settle in fear of the result of a perhaps all-or-nothing 'bellwether' trial is enormous").

This Court recognized the same concern when approving Federal Rule of Civil Procedure 23(f), which grants courts of appeals discretion to accept interlocutory review of a district court's "order granting or denying class-action certification." That provision rests in part on a the pragmatic concern that "[a]n order

granting [class] certification * * * may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23 Advisory Committee Note; see also *Waste Mgmt. Holdings, Inc.* v. *Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000) (noting that one purpose of Rule 23(f) is to "provide[] a mechanism through which appellate courts, in the interests of fairness, can restore equilibrium when a doubtful class certification ruling would virtually compel a party to abandon a potentially meritorious claim or defense before trial"). Likewise, the courts of appeals acknowledge that "when the stakes are large and the risk of a settlement or other disposition that does not reflect the merits of the claim is substantial, an appeal under Rule 23(f) is in order" if the lower court's ruling is "questionable." *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 835 (7th Cir. 1999).[4]

The trial plan approved below presents settlement pressures equal to (and perhaps greater than) a suspect class-certification decision. As explained above, the aggregation of so many plaintiffs raises the concern that the risk of massive liability will lead defendants to settle without regard to the merits of the underlying case. See also Report of the Advisory Committee on Civil Rules and the Working Group on Mass Torts, 187 F.R.D. 293, 305 (1999) ("[A]ggregated plaintiffs may acquire power that dispersed individual plaintiffs would lack, enhancing — and perhaps exaggerating — their

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[4] Accord *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 99-100 (D.C. Cir. 2002); *In re Sumitomo Copper Litig.*, 262 F.3d 134, 139 (2d Cir. 2001); *Newton* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164-65 (3d Cir. 2001); *Lienhart* v. *Dryvit Sys., Inc.*, 255 F.3d 138, 142-43 (4th Cir. 2001); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1274 (11th Cir. 2000).

underlying substantive rights."); Kenneth Bordens & Irwin Horowitz, *The Limits of Sampling and Consolidation in Mass Tort Trials: Justice Improved or Justice Altered?*, 22 LAW & PSYCHOL. REV. 43, 59 (1998) (reporting finding that "the amount of responsibility assigned to the defendant" by juries increased "as the size of the nontrial plaintiff population increased" in mass litigation); Richard Faulk *et al.*, *Building a Better Mousetrap? A New Approach To Trying Mass Tort Cases*, 29 TEX. TECH L. REV. 779, 790 (1998) (noting that large aggregations raise the same settlement concerns as class actions). Moreover, recent experience proves that juries have shown little reluctance to levy massive — and constitutionally improper — punitive damages verdicts upon tobacco companies. In *Williams*, for example, the jury awarded $821,000 in compensatory damages and $79.5 *million* in punitive damages in a single-plaintiff case. See 127 S. Ct. at 1061. This case — which consolidates claims by more than 700 smokers — presents the palpable risk of awards totaling *billions* of dollars.[5]

Indeed, many mass-tort defendants in West Virginia confront what one commentator has called the "Armageddon scenario." Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary, 106th Cong. 89, 98 (1999) (prepared statement of William N. Eskridge, Jr., Professor, Yale Law School) (Eskridge Statement).

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[5] The Chamber does not mean to suggest that such damages are inevitable (much less proper), but that very real possibility cannot be ignored. If Phase II juries award anything approaching the compensatory award in *Williams* to even a substantial percentage of the 700-plus plaintiffs, damages could reach well into the hundreds of millions of dollars *before* the Phase I jury's punitive damages multiplier is applied.

Faced with the prospect of "losing the company on his or her watch," a general counsel or chief executive officer will often seek to settle even if convinced of the merit of the company's position. Lester Brickman, *Lawyers' Ethics and Fiduciary Obligations in the Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 243, 252 (2001); see also Eskridge Statement, *supra*, at 98 ("Even risk-neutral people and firms will tend to take too many precautions or pay too high a settlement price when the chance of devastating loss is significant.").

As if the prospect of billions of dollars in liability were not enough to coerce settlements, the circuit court's cavalier approach toward aggregation adds to those pressures. Because there has been no attempt to ensure meaningful commonality among their allegations — *i.e.*, products used, injuries sustained, or theories of liability — the Phase I proceedings will lump together widely divergent claims. While defendants ordinarily could evaluate each discrete class of plaintiffs with a view to settling those cases presenting the most significant litigation risks, that option is not realistically available here. The risk of not settling cases filed by less-deserving plaintiffs is that a jury will not carefully discriminate among the various individual claims but will simply lump them together in returning a verdict for all plaintiffs on liability, coupled with a hefty punitive damages multiplier. See, *e.g.*, *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (aggregation "magnifies and strengthens the number of unmeritorious claims"). Indeed, empirical research shows that "aggregation of most-injured plaintiffs with less-injured plaintiffs significantly increased the mean awards to the latter." Eskridge Statement, *supra*, at 96. Moreover, there is anecdotal evidence suggesting that, in some mass-tort cases, plaintiffs' lawyers and courts

will not permit defendants to settle the claims of the most sympathetic plaintiffs unless they agree to settle the claims of other plaintiffs as well.[6] Aggregation without adequate commonality thus forces defendants to take account of weak cases that might not otherwise figure in their settlement calculations.

These enormous settlement pressures are further magnified by the trial plan's decided tilt in favor of plaintiffs. As explained above (see pages 5-13, *supra*), the reverse bifurcation procedure prevents defendants from fully presenting their defenses; invites near-standardless speculation by the jury; lacks a constitutionally adequate nexus between a punitive damages award and a given plaintiff; and prevents proper evaluation of the need for punitive damages in light of the actual compensatory award. Thus, defendants' prospects for weathering both phases of these proceedings and then re-presenting this issue for review are grim.

B. Even if this case were to proceed to trial, there are obvious advantages of judicial economy to be gained by deciding this issue now. With so much at stake, the Phase I proceedings will be particularly lengthy and complex. And, because the circuit court has allowed the aggregation of 700-plus plaintiffs presenting a welter of claims and theories, the evidence necessary to resolve those questions will be sprawling. But that is only the

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[6] See Griffin Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve the Asbestos Litigation Crisis*, Briefly ... Perspectives on Legislation, Regulation, and Litigation (Nat'l Legal Ctr. for the Public Interest, Washington, D.C.), June 2002, at 23; Victor Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 AM. J. TRIAL ADVOC. 247, 255 (2000).

tip of the iceberg, because anything short of complete victory for defendants in Phase I will permit scores or hundreds more Phase II proceedings to begin before a final damages figure for individual plaintiffs is established and further review in this Court can be obtained.

The toll on the parties' resources will be even more severe. Litigating these cases to completion will consume tens of thousands of attorney hours, and both sides will incur significant additional expenses — all of which will be for naught if this trial plan is later held unconstitutional. Indeed, plaintiffs' eagerness to avoid this Court's review (Br. in Opp. 12-13) may prove penny-wise and pound-foolish. It is far better to resolve serious threshold constitutional questions now — under the relatively short timetable this Court customarily observes — than to waste years conducting constitutionally defective trials. Indeed, for all of the emphasis plaintiffs and the Supreme Court of Appeals have placed on the "just, speedy, and inexpensive determination" of these actions, Pet. App. 58a (Starcher, J., concurring), resistance to this Court's immediate review is puzzling.

C. Finally, delaying review would make West Virginia even more of a magnet for mass-tort litigation, increasing the risk that still more defendants will be subjected to the pressures and prejudices of this trial scheme. It is no secret that West Virginia is one of the most plaintiff-friendly jurisdictions in the country. See HarrisInteractive, *2007 U.S. Chamber of Commerce State Liability Systems Ranking Study*, at 6, 10 (April 17, 2007), available at http://www.institutefor legalreform.com/lawsuitclimate2007/pdf /Liability_System_Ranking_Study.pdf (nationwide survey of in-house attorneys and senior litigators

revealed that West Virginia ranked last among states with judicial systems likely to "creat[e] a fair and reasonable litigation environment"). Similarly, in 2006 critics ranked West Virginia as "Judicial Hellhole # 1" and observed that — due in large part to the practical unavailability of summary judgment and the lack of any mandatory appellate review — "there seems to be no reasonable limit on damages in the Mountain State." American Tort Reform Found., *Judicial Hellholes 2006*, at 11 (2006), available at http://www.atra.org/reports/hellholes/2006/hellholes2006.pdf ("2006 ATRA Report"). The lure of plaintiff-friendly trial plans such as the one approved here only exacerbates those problems.

Ironically, one of the principal justifications advanced in defense of West Virginia's unorthodox trial plan is the fear that relying on traditional trial methods would cause "administrative gridlock." Pet. App. 57a (Starcher, J., concurring). But any such mess is entirely of West Virginia's own making. As the very judge who is set to try these cases has acknowledged: "'West Virginia was a "field of dreams" for plaintiffs' lawyers. We built it and they came.'" 2006 ATRA Report at 11 (quoting public statement of Hon. Arthur M. Recht). Indeed, the Supreme Court of Appeals recently invalidated (in significant part) an attempt by the West Virginia legislature to amend the State's venue laws to limit the ability of out-of-state plaintiffs to bring their claims to West Virginia's courts. See W. Va. Code Ann. § 56-1-1(c) (West Supp. 2003) ("[A] nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state."); *Morris* v. *Crown Equip. Corp.*, 633 S.E.2d 292, 300 (W. Va. 2006) (striking down same under federal Privileges and Immunities Clause, U.S. Const. Art. IV, § 2, as applied "to civil actions filed against West Virginia

citizens and residents"). The legislature then repealed that provision entirely, W. Va. 2007 Session Laws, Reg. Session, Ch. 1 (H.B. No. 2956) (Apr. 4, 2007), leaving a corporate defendant subject to suit in West Virginia if it "does business" in the state, West. Va. Code. Ann. § 56-1-1(1)(a)(2) (West 2007). Thus, West Virginia remains — by design, it would seem — a "Mecca" for tort litigation, and this Court's immediate review is necessary to ensure that future defendants are not prejudiced while this case winds its way through the courts.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC., BROWN & WILLIAMSON HOLDINGS, INC., LORILLARD TOBACCO COMPANY AND R.J. REYNOLDS TOBACCO COMPANY,

Petitioners,

v.

RONALD ACCORD, JR., *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS WEST VIRGINIA

MOTION FOR LEAVE TO FILE AND BRIEF AMICI CURIAE OF Ciba CORPORATION, CHEMTALL INCORPORATED, CYTEC INDUSTRIES INC., G.E. BETZ, INC., AND ZINKAN ENTERPRISES INC. IN SUPPORT OF PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS WEST VIRGINIA

MOTION FOR LEAVE TO FILE AND BRIEF AMICI CURIAE OF Ciba CORPORATION, CHEMTALL INCORPORATED, CYTEC INDUSTRIES INC., G.E. BETZ, INC., AND ZINKAN ENTERPRISES INC.

Pursuant to Supreme Court Rule 37.2(a), movants Ciba Corporation, Chemtall Incorporated, Cytec Industries, Inc., G.E. Betz, Inc., and Zinkan Enterprises Inc., request leave to file the accompanying Brief Amici Curiae in Support of Petitioners.* Movants' brief brings

* Counsel for Amici Curiae provided timely notice of intent to file the accompanying brief to Counsel of Record for both Petitioners and Respondents on January 4, 2008. Petitioners (Cont'd)

to the attention of the Court a relevant matter that will be of considerable help in considering the Petition, *see* Sup. Ct. R. 37.1 – namely, that the unconstitutional proceeding described in the Petition has been repeatedly blessed by the West Virginia state courts. The breadth of this problem is further reason to grant the Petition.

Like Petitioners, Movants are defendants in tort litigation currently pending in West Virginia state court. Movants' experience in that separate litigation demonstrates the "increasing frequency," Pet. at 2, and startling scope of West Virginia's disregard for this Court's punitive damages jurisprudence. The accompanying brief describes how the constitutionally deficient punitive damages procedures employed in Petitioners' case have been extended by West Virginia courts into other contexts. It also illustrates how the West Virginia Supreme Court of Appeals shows no interest in preventing further growth in the use of these procedures and indeed appears to be fully supportive of them.

Movants are manufacturers, distributors and sellers of a beneficial water treatment chemical used, *inter alia*, to recycle water in coal processing operations. They have been sued in West Virginia Circuit Court by a putative class of coal preparation plant workers who allege exposure to the water cleaner. *See Stern v. Chemtall*, No. 03-C049M (W.Va. Marshall County Cir. Ct. April 1, 2003). The *Stern* plaintiffs seek medical monitoring

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(Cont'd)
consented to the filing of the attached brief in a letter that has been lodged with the Clerk of this Court. Respondents' counsel refused consent.

and punitive damages on a class-wide basis.** As in Petitioners' case, the trial court adopted a case management plan which bifurcated punitive damage issues – the availability of punitive damages and a punitive damages multiplier – from logically precedent issues relating to liability. Thus, the parties will litigate class certification and liability, if any, for medical monitoring only after completion of the punitive damages trial phase. Memorandum Order (January 9, 2007). The West Virginia Supreme Court of Appeals allowed this trial plan to stand when it denied a writ of prohibition in a published opinion. *State ex rel. Chemtall Inc. v. Madden*, No. 33380, 2007 WL 4098937 (W.Va. Nov. 15, 2007).

Movants will themselves seek a writ of certiorari in this Court in a timely manner. They support the petition here in order to highlight the imperative need for this Court's intervention. As these cases demonstrate, the courts of West Virginia continue to apply facially defective methodologies for calculating punitive damages in mass tort litigation. Such "reverse bifurcated trials," which calculate punitive damages before individualized factors such as causation, put the cart before the horse. The increasing reliance on this constitutionally deficient procedure creates the risk that punitive damages will be assessed without regard to any individual plaintiffs' actual harm, as required by this Court's decisions in *State Farm Mutual Automobile Insurance Co. v.*

** Movants, Ciba Corporation and Cytec Industries, Inc. have also been sued in West Virginia Circuit Court by a separate putative class of coal preparation workers. *See Pettry v. Peabody Holding Co.*, No. 02-C-58 (W. Va. Marshall County Cir. Ct. March 28, 2002). Two *Pettry* plaintiffs have intervened in *Stern*. The trial plan discussed herein was entered in *Stern* only.

Campbell, 538 U.S. 408 (2003) and *Philip Morris USA Inc. v. Williams*, 127 S. Ct. 1057 (2007). Immediate review is warranted before these unconstitutional proceedings go forward. They threaten to distort the litigation process in a manner that cannot be corrected on appeal, as Justice Benjamin noted in his dissent from the West Virginia Supreme Court of Appeals' denial of the writ of prohibition. *Chemtall*, 2007 WL 4098937 at *5 (Benjamin, J., concurring in part and dissenting in part).

Accordingly, Movants respectfully request the opportunity to set forth more fully the growing problem in West Virginia that justifies the grant of the Petition.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE PETITION SHOULD BE GRANTED TO CURTAIL THE EXPANDING USE OF CONSTITUTIONALLY DEFECTIVE PUNITIVE DAMAGES PROCEDURES IN WEST VIRGINIA COURTS	5
II. MASS TORT DEFENDANTS ARE UNLIKELY TO OBTAIN RELIEF FROM CONSTITUTIONALLY DEFECTIVE PUNITIVE DAMAGES PROCEDURES IN THE ABSENCE OF ACTION BY THIS COURT	10
CONCLUSION	13
APPENDIX — MEMORANDUM ORDER OF THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA DATED JANUARY 9, 2007 RE: *STERN, ET AL. v. CHEMTALL INC., ET AL.*	1a

TABLE OF CITED AUTHORITIES

Page

Cases

BMW of N. Am. Inc. v. Gore,
517 U.S. 559 (1996) 5

Bower v. Westinghouse Elec. Corp,
206 W.Va. 133, 522 S.E.2d 424
(W.Va. 1999) 3

Gibson v. Berryhill,
411 U.S. 564 (1973) 11

In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.,
55 F.3d 768 (3d Cir. 1995) 12

In re Rhone-Poulenc Rorer, Inc.,
51 F.3d 1293 (7th Cir. 1995) 12

Philip Morris USA Inc. v. Williams,
__ U.S. ___, 127 S. Ct. 1057 (2007) ..... *passim*

State ex rel. Chemtall Inc. v. Madden,
No. 33380, 2007 WL 4098937
(W.Va. Nov. 15, 2007) 4, 10, 11

State Farm Mutual Automobile Insurance Co. v. Campbell,
538 U.S. 408 (2003) 5, 8

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Page

Constitution

U.S. CONST. amend. XIV ..... *passim*

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No. 07-806

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC., BROWN & WILLIAMSON HOLDINGS, INC., LORILLARD TOBACCO COMPANY AND R.J. REYNOLDS TOBACCO COMPANY,

Petitioners,

v.

RONALD ACCORD, JR., *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS WEST VIRGINIA

MOTION FOR LEAVE TO FILE AND BRIEF AMICI CURIAE OF Ciba CORPORATION, CHEMTALL INCORPORATED, CYTEC INDUSTRIES INC., G.E. BETZ, INC., AND ZINKAN ENTERPRISES INC.

INTEREST OF AMICI CURIAE[1]

Amici Curiae Ciba Corporation, Chemtall Incorporated, Cytec Industries Inc., G.E. Betz, Inc., and

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their (Cont'd)

Zinkan Enterprises Inc. file this brief in support of Petitioners to emphasize the mounting constitutional inequities facing mass tort defendants in the determination of punitive damages by the courts of West Virginia. Petitioners have cogently explained the need for this Court's intervention to correct an unconstitutional approach to the adjudication of punitive damages claims that the West Virginia courts employ with "increasing frequency." Pet. at 2. Amici explain herein that the problems identified in the Petition are neither isolated nor likely to be resolved by the West Virginia Supreme Court of Appeals.

Like Petitioners, Amici Curiae are currently defendants in mass tort litigation seeking punitive damages in West Virginia state trial court. Amici are manufacturers, distributors and sellers of polyacrylamide, a chemical used to purify drinking water and treat waste water. Polyacrylamide has numerous beneficial uses, including the cleaning of water used in coal processing operations. The substance separates coal sediment from process water, thereby preventing pollution of streams and rivers and permitting the recycling of the water. The safety of polyacrylamide products has been repeatedly assessed by regulatory agencies throughout the world, which have found them to be safe and appropriate for these applications.

Amici have been sued in a putative class action pending in Marshall County Circuit Court. *See Stern v. Chemtall*

(Cont'd)
counsel made a monetary contribution to its preparation or submission. The Petitioners have consented to the filing of this brief. The Respondents have withheld their consent.

Inc., No. 03-C-49M (W.Va. Marshall County Cir. Ct. April 1, 2003) ("*Stern*"). This action asserts theories of strict liability against Amici for their sale of and conduct with respect to polyacrylamide products used in coal preparation.[2] Although no class has been certified, plaintiffs seek class-wide relief in the form of medical monitoring pursuant to *Bower v. Westinghouse Elec. Corp.*, 206 W.Va. 133, 522 S.E.2d 424 (W.Va. 1999).[3] Most relevant here, they also seek punitive damages.

This case vividly demonstrates West Virginia's growing disregard for this Court's punitive damages jurisprudence. As in the case under review, the case management order in *Stern* requires the jury to determine both punitive damages liability and a punitive damages multiplier before *any* facts are developed regarding the individual experience of *any* single plaintiff. Remarkably, the case management order will require the jury to assess the availability and the degree of punitive damages before it is determined whether a) a class can be certified; b) whether a single defendant is liable to any plaintiff; or c) whether any plaintiff is entitled to

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2. Amici Ciba Corporation and Cytec Industries, Inc., have also been sued in a separate class action brought by a putative class of coal preparation plant workers, two representatives of which have intervened in *Stern*. *Pettry v. Peabody Holding Co.*, No. 02-C-58, (W. Va. Marshall County Cir. Ct. March 28, 2002) ("*Pettry*"). A third plaintiff, purporting to represent a putative class from a separate water treatment industry, has also intervened in the *Stern* action. The trial plan at issue discussed in this brief applies only to the *Stern* matter.

3. A medical monitoring claim under *Bower* imposes liability not for actual harm but for increased risk of future disease. *Bower*, 206 W. Va. at 142, 522 S.E.2d at 433.

medical monitoring due to an increased risk of future disease.

Amici's trial plan order provides significant insight into both the substantive problem facing mass tort defendants in West Virginia courts and the failure of the West Virginia Supreme Court of Appeals to address the problem. That court recently denied review of Amici's petition for a writ of prohibition, concluding that the trial plan "does not guarantee a result at odds with" this Court's decisions. *Chemtall v. Madden*, No. 33380, 2007 WL 4098937 at *4 (W.Va. Nov. 15, 2007) (citing *Philip Morris USA Inc. v. Williams*, __ U.S. __, 127 S. Ct. 1057 (2007)). While Amici intend to seek certiorari to ask this Court to review that decision, this Petition may be resolved before Amici's petition is fully briefed.[4] Accordingly, Amici have a strong interest in ensuring that this Court has the benefit of Amici's experience in considering the Petition.

SUMMARY OF ARGUMENT

This court should grant the Petition to correct West Virginia's repeated use of a constitutionally deficient punitive damages procedure. This procedure is gaining increasing currency in the courts of West Virginia, a magnet jurisdiction for mass tort litigation. As Amici's experience suggests, the West Virginia Supreme Court of Appeals has shown no willingness to set matters right. Thus, an increasing number of mass tort defendants are likely to be subjected to liability for punitive damages before any demonstration of the basic elements of liability and causation on plaintiffs' underlying claims. The trial order

4. Amici's petition is currently due on February 13, 2008.

in Amici's cases illustrates the broad reach of the procedure challenged in the Petition. The trial order applies the "punitives first" bifurcation procedure to a putative class action seeking only equitable relief in the form of medical monitoring. Not only is this methodology wholly inconsistent with the due process precedent of this Court, it is also unlikely to be corrected in the absence of action by this Court. The issue is ripe for review, and the Petition should be granted.

ARGUMENT

I. THE PETITION SHOULD BE GRANTED TO CURTAIL THE EXPANDING USE OF CONSTITUTIONALLY DEFECTIVE PUNITIVE DAMAGES PROCEDURES IN WEST VIRGINIA COURTS

West Virginia courts have drawn widespread criticism for their handling of mass tort claims. *See* Pet. at 25 & n.6. The bifurcated punitive damages procedure challenged in the Petition further supports a perception that a corporate defendant is at an unfair disadvantage litigating in the courts of West Virginia. This procedure, imposed with increasing frequency in the state disregards this Court's guidance regarding the constitutionally mandated safeguards for imposing punitive damages. *See BMW of N. Am. Inc. v. Gore*, 517 U.S. 559 (1996); *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003); *Philip Morris*, 127 S. Ct. 1057.

The Petition provides but one example of the West Virginia courts' unwillingness to follow this Court's due process jurisprudence. As Amici's experience

demonstrates, the constitutional conundrum highlighted in the Petition is not isolated, but has spread into broader contexts in West Virginia courts – with no end in sight. The West Virginia Supreme Court of Appeals has shown no interest in addressing these problems. Its inaction ensures that mass tort defendants will face hopelessly dysfunctional punitive damage proceedings, in which basic notions of procedural fairness are disregarded for the sake of expediency.

While hardly unique in West Virginia mass tort cases,[5] the trial plan applicable to Amici is illustrative of the problem. Amici produce and sell a beneficial chemical substance that has never been determined to have harmed any person or even to possess the potential to cause harm. Nevertheless, they are now being forced to litigate their liability for punitive damages and an across-the-board multiplier for punitive damages, before being given an opportunity to dispute threshold issues of class certification, causation and liability for the medical monitoring that plaintiffs seek.

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5. West Virginia has already employed a reverse bifurcation format in several different asbestos matters involving the claims of approximately 30,000 plaintiffs. *See In re Asbestos Cases*, No. 89-C-999 (W. Va. Kanawha County Cir. Ct. Feb. 15, 1989); *In re Asbestos Cases II*, No. 91-C-7777 (W. Va. Kanawha County Cir. Ct. Mar. 13, 1991); *In re Asbestos Cases III*, No. 92-C-8888 (W. Va. Kanawha County Cir. Ct. Feb. 6, 1992); *In re Asbestos Personal Injury Litigation*, No. 02-C-9004 (W. Va., Mongolia County Cir. Ct. Sept. 23, 2002); *In re Asbestos Personal Injury Litigation*, No. 03-C-9800 (W. Va., Kanawha County Cir. Ct. Feb. 11, 2003). As Petitioners and Amici demonstrate, West Virginia recently expanded this trial format well outside of the asbestos arena. *See also Leach v. E.I. DuPont de Nemours & Co.*, No. 01C-608 (W. Va., Wood County Cir. Ct. Aug. 30, 2001) (asserting a claim for medical monitoring for chemical exposure).

The *Stern* plaintiffs seek recovery in strict liability against Amici for their sale of polyacrylamide, a substance that facilitates separation of solids suspended in liquid waste streams. In preparing coal for market, rock and sediment must be separated from usable coal, a process that results in a large amount of dirty waste water. Polyacrylamide products separate solid particles from this waste water, permitting reuse of the cleaned water and avoiding the pollution of rivers and streams that was once common in coal processing. Plaintiffs allege that a trace residual chemical in polyacrylamide, known as acrylamide, is likely to cause future diseases warranting medical monitoring. Plaintiffs' claims are undercut by the findings of regulatory agencies around the world, which have found no risk to human health presented by the trace amounts of the substance in the products at issue.

On January 9, 2007, over the objection of the Amici, the Circuit Court of Marshall County entered a case management order bifurcating issues of product defect and punitive damages from class certification and medical monitoring. Mem. Order of Jan. 9, 2007.[6] In Phase I, the parties will try issues relating to plaintiffs' strict liability theories.[7] On that basis alone, the court will then inquire

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6. The relevant portions of this Memorandum Order have been attached as an addendum for the convenience of the Court. App. at 1(a).

7. The Order sets several strict liability issues for trial in Phase I, including whether the defendants had actual or constructive knowledge of the alleged hazard posed by their products; whether the state of medical, scientific, and industry knowledge throughout the time of alleged exposure could have

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"whether or not the Defendants, or any of them, acted in such a manner as to justify punitive damages," and, if so, "what multiple of general damages would suffice as a deterrent of future actions against that particular Defendant." App. at 4(a). Only upon completion of the trial for punitive damages will the court hear in Phase II "issues of medical causation, medical monitoring viability, and damages." *Id.* In short, punishment will be assessed in the abstract, without any actual finding as to what, if any, wrongful actions must be deterred.

As this Court has repeatedly stressed, however, the determinations of liability for, and the amounts of, punitive damages depends on the facts of a particular case, including the circumstances surrounding an individual plaintiff's purported injury. *See, e.g., State Farm*, 538 U.S. at 418 (requiring consideration of "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award"); *id.* at 425 ("The precise award [of punitive damages] in any case . . . must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff."). The Due Process Clause requires that a court "avoid procedure that unnecessarily deprives juries of proper legal guidance," so that the juries "are not asking the wrong question." *Philip Morris*, 127 S. Ct. at 1064.

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reasonably foreseen that persons working with the products were at risk to sustain injury as a result of the exposure; whether the defendants properly tested their products; whether the products are unreasonably dangerous; and issues of warning, proper instruction, and provision of protective devices. App. at 2(a).

By putting liability and multipliers for punitive damages before the logically and legally precedent questions of injury and causation, these trial management orders create precisely the jury confusion that due process prevents. Under this procedure, juries are left to determine eligibility for punitive damages and the amount by which all plaintiffs' awards should be enhanced before they determine whether a single plaintiff has prevailed against any defendant. *See Philip Morris*, 127 S. Ct. at 1063 (discussing danger of jury speculation on issues such as: "How many such victims are there? How seriously were they injured? Under what circumstances did the injury occur?"). Such a procedure recalls the Queen of Hearts' pronouncement, "Sentence first – verdict afterwards." Lewis Carroll, *Alice's Adventures in Wonderland* 83 (Philip Smith ed., Dover Publications 1993)(1898).

While Amici's and Petitioner's cases raise the same constitutional infirmity, the differences between the underlying claims demonstrate the seemingly limitless applicability of the defective bifurcation procedure. The trial plan confronting Amici does not involve claims for compensatory damages. It only presents claims for equitable relief in the form of medical monitoring. Plaintiffs are also permitted to seek punitive damages for a class of plaintiffs without being required to prove the prerequisites of class certification. The trial court's order demonstrates the pressing need for corrective action by this Court.

II. MASS TORT DEFENDANTS ARE UNLIKELY TO OBTAIN RELIEF FROM CONSTITUTIONALLY DEFECTIVE PUNITIVE DAMAGES PROCEDURES IN THE ABSENCE OF ACTION BY THIS COURT

The West Virginia Supreme Court of Appeals has shown no inclination to correct the constitutionally defective procedures for punitive damages employed by West Virginia trial courts, including the reverse bifurcation at issue here. Mass tort defendants are left without recourse for the injuries that arise from the unconstitutional design of the proceedings. This upside down structure has *in terrorem* effects. Faced with the threat of a punitive damages determination before being permitted a chance to rebut plaintiffs' claims of injuries, mass tort defendants are under tremendous pressure to settle early. Under these circumstances, this Court's immediate review is necessary.

In the case under consideration, the West Virginia Supreme Court of Appeals refused, without comment, the writ of prohibition sought by the Petitioners. Pet. App. 1a-2a. In *Chemtall*, however, decided just one week later, the Court issued an opinion. That opinion makes clear that the West Virginia Supreme Court is unlikely ever to resolve the issues presented in the Petition. Amici argued, as Petitioners did in their case, that "the circuit court's procedure for awarding punitive damages violates [Amici's] due process rights as set forth in *Philip Morris* because it requires a jury to determine punitive damages without taking into account a plaintiff's individualized harm and prior to a finding of actual liability against any defendant." *Chemtall*, 2007 WL 4098937, at *4. The court found "no merit" to this argument. It reasoned that the

trial plan, "on its face, is not a clear error of law because it does not guarantee a result at odds with *Philip Morris*." *Id.* Because the trials have not yet occurred, the Court concluded that a decision on the constitutionality of punitive damages would be premature. *Id.*

That analysis, however, ignores the nature of the error and the inevitability of the due process deprivation that will occur as a result. It is the very structure here that causes the constitutional deprivation and forces early settlement. Where an unconstitutional structure causes an ongoing injury, federal review prior to completion of the proceeding is necessary and appropriate. *See Gibson v. Berryhill*, 411 U.S. 564 (1973).

The West Virginia Supreme Court of Appeals' unwillingness to consider these issues before trial only ensures the likelihood of harm to mass tort defendants like Petitioners and Amici. As Justice Benjamin ably explained in dissent, the court's decision to delay "consideration of the matters raised herein until an eventual [post-trial] appeal poses a distinct potential for prejudice to the due process rights of the petitioners." *Chemtall v. Madden*, No. 33380, 2007 WL 4098937 at *5 (W.Va. Nov. 15, 2007) (Benjamin, J., concurring in part and dissenting in part). As a practical matter, that prejudice is "not correctable on appeal." *Id.* Under these circumstances, the Court's failure to review the unconstitutional procedure "constrains the effective choices realistically available to the petitioners to such a degree as to implicate grave due process considerations." *Id.* at n.1. "By failing to confront the issues raised herein," Justice Benjamin concluded, the court is "acquiescing to a system whereby case management machinations and procedural chicanery rather than

substantive law and facts appear to determine the outcome of the litigation. *The right to defend yields to the need to settle.*" *Id.* (emphasis added).[8]

The instant petition presents this Court with the opportunity to correct a growing constitutional problem in mass tort litigation in the courts of West Virginia. Amici respectfully suggest that their experience litigating in those courts confirms the expanding problem and provides additional compelling reasons for granting the Petition. Review is warranted now.

8. *Cf. In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (Posner, J.) (recognizing in class action context that mass aggregation can produce coercive legal "blackmail settlements"); *In re Gen. Motors Corp. Pick Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784-85 (3d Cir.) ("legalized blackmail").

CONCLUSION

For the foregoing reasons and for the reasons stated in the Petition, Amici Curiae request that this Court grant the Petition for a Writ of Certiorari.

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APPENDIX

APPENDIX — MEMORANDUM ORDER OF THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA DATED JANUARY 9, 2007 RE: *STERN, et al. v. CHEMTALL INC., et al.*

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

Civil Action No. 03-C049M

WILLIAM K. STERN, et al.,

Plaintiffs,

v.

CHEMTALL INCORPORATED, et al.,

Defendants.

AND

Civil Action No. 02-C-58
(Boone County Circuit Court)

DENVER PETTRY and DEBRA PETTRY, et al.,

Plaintiffs,

v.

PEABODY HOLDING COMPANY, et al.,

Defendants.

Appendix

MEMORANDUM ORDER

This matter comes before the Court from the West Virginia Supreme Court of Appeals on a Decision filed December 2, 2004 which granted the relief sought through prohibition and vacated the September 26, 2003 Order of this Court certifying a seven-state class action for medical monitoring and punitive damages arising out of the alleged exposure of coal preparation plant workers to acrylamide-containing products. The Supreme Court of Appeals held that this Court's analysis in comparing West Virginia law with the applicable laws of the other states on strict liability, medical monitoring, disposing of these matters and protecting the interests of the parties. Therefore, the issues of liability and punitive damages will be bifurcated from medical monitoring and class certification issues.

1. Bifurcation of Liability and Punitive Damages Multiplier. The first phase of the trial will involve liability and whether the Defendants' actions and/or inactions justify punitive damages, and if so, what multiple of general damages will be assessed as a punitive damage multiplier as to each Defendant. Specifically, the following issues will be tried in the first phase of the trial.

a. Whether the Defendants, or any of them, had actual or constructive knowledge of the hazard posed by their acrylamide-containing products.

b. Whether or not the state of the medical, scientific, and industry knowledge throughout the time of Plaintiffs' exposure was such that Defendants, or any of them, could have reasonably foreseen that persons working with and around acrylamide-containing were at risk to sustain injury as a result of exposure to said products.

c. Whether or not Defendants, or any of them, failed to properly test their products.

d. Whether or not Defendants, or any of them, manufactured, processed, sold, and/or distributed unreasonably dangerous products.

e. Whether or not Defendants, or any of them, failed to adequately warn the Plaintiffs of the inherent dangers, if any, in their products.

f. Whether one or more of the Defendants failed to recommend and/or provide protective devices for use with its acrylamide-containing products.

g. Whether or not Defendants, or any of them, failed to provide instructions to foreseeable users of proper methods of handling of acrylamide-containing products.

h. Whether or not Defendants, or any of them, breached any continuing duty to warn Plaintiffs.

i. Whether or not the acrylamide-containing products manufactured and sold by the Defendants, or any of them, were not reasonably safe (strict liability in tort) as manufactured or marketed.

j. Whether or not the Defendants, or any of them, acted in such a manner as to justify punitive damages.

k. If any Defendants' actions or inactions were of such a nature as to justify punitive damages, what multiple of general damages would suffice as a deterrent of future actions against that particular Defendant.

2. Causation and Damages. Should Plaintiffs prevail on the issue of liability, the parties will proceed in the second phase to try the issues of medical causation, medical monitoring viability, and damages.

3. Timing for Discovery and Pretrial Matters. The following shall be established and observed as to discovery and other activity in this matter up through and including the first phase of the trial by a jury.

a. **February 1, 2007:** Plaintiffs shall serve a list of proposed fact witnesses.

b. **March 3, 2007:** Defendants shall serve a list of proposed fact witnesses.

c. **April 3, 2007:** Plaintiffs shall designate all liability and punitive damages expert witnesses and provide Rule 26(b) information.

d. **May 5, 2007:** Defendants shall designate all liability and punitive damages expert witnesses and provide complete Rule 26(b) information as to each expert designated.

e. **September 1, 2007:** The parties will exchange witness and exhibit lists for trial.

f. **September 30, 2007:** All discovery shall be completed.

g. **October 15, 2007:** All dispositive motions, *Daubert/Wilt* motions in limine, summary judgment motions, or other pretrial motions, with supporting memoranda shall be filed. This provision should not be construed to prohibit the filing of any dispositive or other motions at any earlier point in time. In the event of such filing, responses will be due in the time provided by the Rules.

h. **October 29, 2007:** Non-movants shall respond with supporting memoranda to any dispositive or other pretrial motions.

i. **November 5, 2007:** Replies to any such motions shall be filed.

j. **November 15, 2007** at 1:30 p.m.: A hearing on all dispositive or other pretrial motions will be held, if appropriate.

k. **November 26, 2007** at 10:00 a.m.: Pretrial Conference. All parties are directed to exchange and deliver their respective pre-trial conference memoranda to the Court's Marshall County Office, with a courtesy copy for the Court, *no later than seven (7) days preceding* the conference. Said memoranda are to include at a minimum the following:

(1) Statement of the Case
(2) Issues of Fact
(3) Issues of Law
(4) Proposed Stipulations
(5) List of Witnesses
(6) Pending Motions

At the time of the Pretrial Conference the Court will determine when exhibits, *voir dire* questions, jury instructions, and any remaining motions *in limine* are to be filed by the parties.

l. **December 3, 2007:** First Phase of Trial begins.

4. Modification. In accordance with W.Va.R.Civ.P. 16(b), this Memorandum Order shall not be modified except by leave of the Court.

5. Sanctions. In accordance with W.Va.R.Civ.P. 16(f), the Court will impose the full spectrum of sanctions authorized by W.Va.R.Civ.P. if a party or party's counsel fails to obey this Order or other Orders or Rules of this Court.

6. Unless authorized by the Court the above dates are final.

7. Production of Documents. Unless otherwise agreed, when the parties are required to produce documents in response to discovery pleadings or for any other reason, they shall produce copies (via either paper copies, computer disk or other electronic means) of each document to all counsel of record, in both matters.

8. Preservation of Documents. During the pendency of this litigation, until further order of this Court, the parties shall take reasonable steps to preserve all documents within their possession, custody or control, including computer-generated and stored information and materials such as computerized data and electronic mail, containing information that is materially relevant to the subject matter of the pending litigation.

9. Communications Among Counsel. The Court recognizes that cooperation by and among counsel is essential for the orderly and expeditious resolution of this litigation. Accordingly, communications and information sharing among and between counsel for Plaintiffs and counsel for Defendants is encouraged, and shall not be deemed a waiver of the attorney-client privilege, attorney work-product privilege, or any other privilege. Any and all joint defense and joint prosecution agreements, in either *Stern* or *Pettry*, are hereby recognized and approved.

10. Protective Order. The protective orders governing production of materials in discovery previously entered into in either *Pettry* or *Stern* are deemed to be continuing and in effect; parties in these matters shall seek to add signatories to such agreements as necessary to allow all parties in either *Stern* or *Pettry* access/use of the material governed by such orders.

It is so ORDERED.

The Clerk shall transmit a copy of this memorandum order to all counsel of record.

Dated: this 9th day of January, 2007.

s/ John T. Madden
JOHN T. MADDEN, JUDGE